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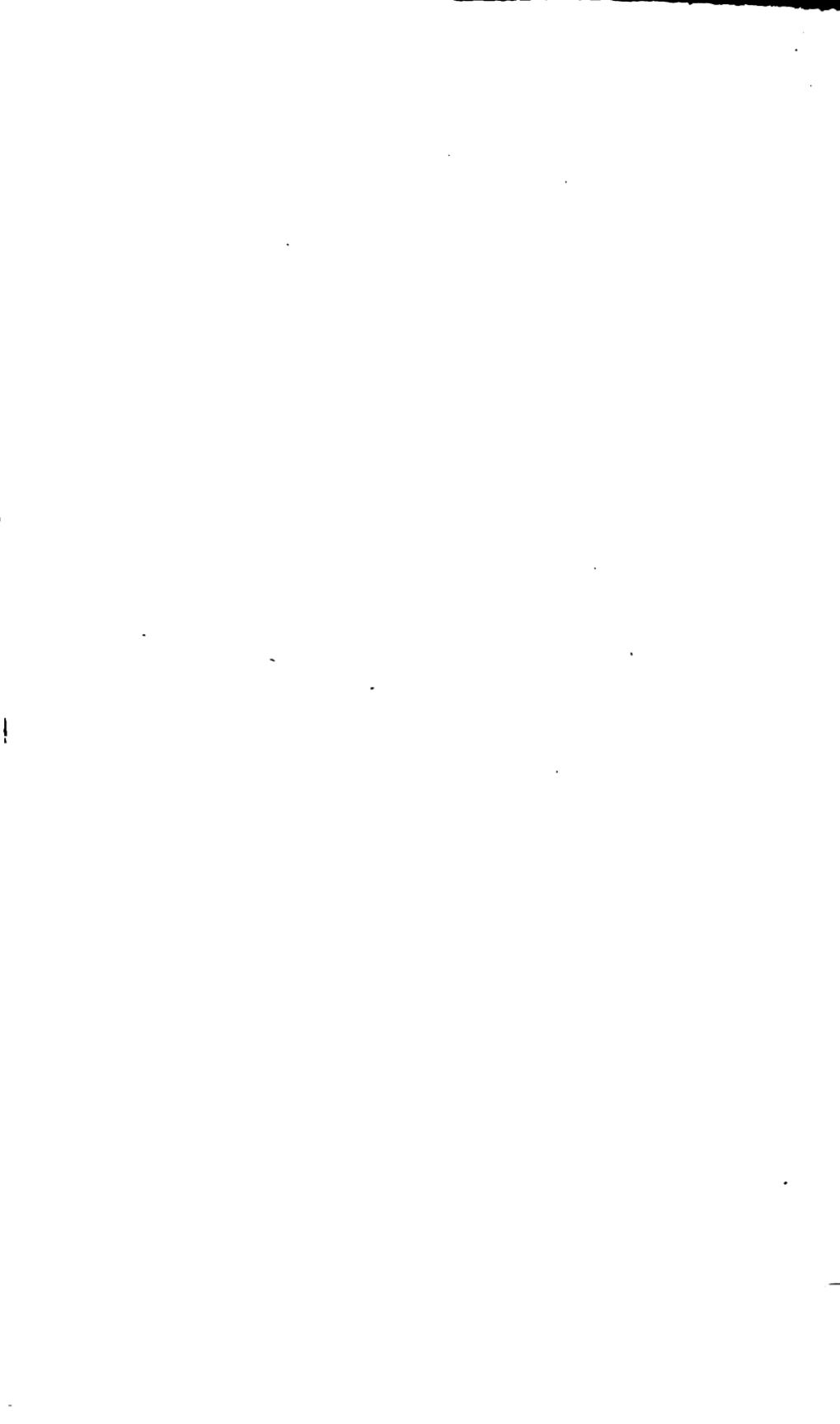
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CASES
ARGUED AND DETERMINED
IN THE COURTS OF
Common Pleas & Exchequer Chamber,
AND IN
The House of Lords:

FROM
**HILARY TERM, 1834, to TRINITY TERM, 1834,
BOTH INCLUSIVE.**

—
BY
**JOHN BAYLY MOORE Esq.; AND JOHN SCOTT, Esq.,
OF THE INNER TEMPLE, BARRISTER AT LAW.**

—
VOL. IV.
—

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**S. SWEET, CHANCERY LANE, FLEET STREET,
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JUDGES
OF THE
COURT OF COMMON PLEAS,
DURING THE PERIOD COMPRISED IN THIS VOLUME.



**Th Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., Lord
Chief Justice.**
The Hon. Sir JAMES ALLAN PARK, Knt.
The Hon. Sir STEPHEN GASELEE, Knt.
The Right Hon. Sir JOHN VAUGHAN, Knt.
The Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.



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T A B L E

OF THE

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ERRATA.

Page 1, marginal note, last line but one, for "before" (in part of the impression) read "after."

Page 487, marginal note. line 2, for "2 Will. 4," read "4 Will. 4."

In the Exchequer Chamber.

MICHAELMAS VACATION, 4 WILL. IV.

ARMSTRONG v. LEWIS and Others.

[In Error.]

1833.

Tuesday,
Nov. 26th.

THIS was an issue directed by His Honor, the Master of the Rolls. The issue stated that one Robert Armstrong, now deceased, in his lifetime, and at the time of his death, and before the discourse thereafter mentioned, used, exercised, and carried on the business or concern of a pawnbroker, to wit, &c.; that, before the making of the promise of the defendant thereafter next mentioned, to wit, on &c., in &c., a certain discourse was had and moved by and between the plaintiffs and the defendant, wherein the following questions then and there arose, viz. first, whether, at the death of the said Robert Armstrong, Samuel Shepheard Warner was legally to be considered as a partner of the said Robert Armstrong, and entitled to receive payment at the rate of 10*l.* per cent. upon the capital advanced by him out of the profits or effects of the concern; and secondly; if he was to be considered as such partner and entitled to receive payment as aforesaid, then, whether he was entitled to receive such payment on a sum of 4,300*l.*: and, in that discourse, the

A contract made between two or more persons to enter into a partnership in contravention of the law, is void, and confers no rights upon either party.

A. and B. carried on the business of a pawnbroker in partnership under a deed. The business was conducted solely by A., and his name alone appeared over the shop-door and upon the printed tickets and duplicates used by persons in that trade, and the license contained the name of A. only:—Semble, that, although the parties might by

39 & 40 Geo. 3,

this contract have rendered themselves liable to penalties imposed by the statute c. 99, yet that, there being no actual agreement for an infraction of the law, the contract was not void.

Where exceptions are not properly taken—as, where they appear upon the record before the finding of the jury—the Court of error cannot give judgment thereon.

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plaintiffs then and there asserted, &c. &c., concluding in the usual form.

The issue came on for trial before Lord Chief Baron Lyndhurst, at the Sittings at Westminster in Hilary Term, 1832. The plaintiffs' counsel, to maintain the issues on their part, proved that Robert Armstrong had carried on the business of a pawnbroker, in Baldwin's Gardens, Leather Lane, Holborn, for several years before the making of the deed hereinafter next mentioned, and continued to carry on such business at the same place, *in his own sole name*, until the time of his death, which happened in the month of August, 1819: and the plaintiffs claimed, that, whilst Armstrong so carried on his said business in his own name, he the said S. S. Warner was a dormant and secret partner; and, to support such claim, they gave in evidence a certain deed, purporting to be a deed of co-partnership, dated the 24th June, 1810, between the said S. S. Warner, deceased, and the said R. Armstrong, deceased; of which the following is a copy:—

“ This indenture made this 24th June, 1810, between Samuel Shepheard Warner, of King Street, in the parish of St. George, Bloomsbury, in the county of Middlesex, dyer, of the one part, and Robert Armstrong, of Baldwin's Gardens, in the parish of St. Andrew, Holborn, and county aforesaid, pawnbroker, of the other part: Whereas the said S. S. Warner and R. Armstrong have consented and agreed to become co-partners and joint traders in the trade or business of a pawnbroker, which the said Robert Armstrong now carries on in Baldwin's Gardens aforesaid: Now this indenture witnesseth that the said S. S. Warner and R. Armstrong, for and in consideration of the good opinion they have and entertain for each other, and also in consideration of the sum of 2,000*l.* of lawful money of Great Britain advanced by the said S. S. Warner to the said R. Armstrong, the receipt whereof he the said R. Armstrong doth hereby acknowledge, have concluded and

agreed, and by these presents do mutually covenant, promise, and agree to and with each other, to be and continue co-partners and joint traders in the trade or business of a pawnbroker, and all things appertaining thereto, for and during the term of fourteen years, to commence from the day of the date hereof; determinable, nevertheless, as hereinafter mentioned: and the same joint trade or business is to be managed and carried on in Baldwin's Gardens aforesaid, in the house wherein the said R. Armstrong now carries on the said trade or business of a pawnbroker, or in any other place or places that the said parties hereto may think it prudent or advisable for that purpose. And it is hereby further agreed by and between the said parties hereto, that they shall and will, during the term and continuance of this co-partnership, keep such and so many books of account as shall be proper and necessary for carrying on the said business; wherein from time to time shall be fairly entered exact and true accounts of all their loans, buyings, sellings, receipts, and payments, with the circumstances of the dates, sums, and parties, and of all their other transactions relating to the said trade or business; which said book or books shall remain and be kept by the said R. Armstrong in such safe and convenient place and in such manner that the said S. S. Warner shall at all times have free liberty to inspect and examine the same and take copies or extracts thereof: And it is hereby mutually agreed by and between the said parties hereto that the said trade or business of a pawnbroker shall be conducted and carried on by the said R. Armstrong, who shall be at liberty to employ and engage such journeymen, servants, or apprentices as to him shall seem necessary and expedient for conducting and carrying on the said trade or business of a pawnbroker: And it is further agreed that the said parties hereto shall once in every three months examine their books of accounts, and join

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in making up the same, and balance, adjust, and settle the same accordingly; the first examination and adjustment to take place on Michaelmas-day next ensuing the date thereof; at which time the said S. S. Warner shall receive and take the sum of 50*l.* out of the said co-partnership concern as and for his share and proportion of the profits arising therefrom; and the like sum of 50*l.* at every subsequent adjustment and settlement, which it is hereby mutually agreed shall take place quarterly and every quarter during the continuance of the co-partnership: And it is hereby further mutually agreed, that, in case either of the parties hereto shall be minded and desirous of putting an end to and determining this co-partnership at the end of the first three, seven, or ten years of the said term of fourteen years, and shall give twelve calendar months' notice or warning in writing to the other of such his mind and intention, that then and in such case this co-partnership shall cease and determine as if the whole term of fourteen years had been suffered to run out and expire; any thing herein contained to the contrary in any wise notwithstanding: And further, that, at the dissolution of the said co-partnership as aforesaid, the said S. S. Warner shall be at liberty to draw out of the said co-partnership concern the said sum of 2,000*l.* so advanced by him at the time of the execution of these presents: And it is further agreed by and between the said parties hereto, that, during the continuance of this co-partnership, it shall not be lawful for the said R. Armstrong to discount any promissory note or bill of exchange without the license and consent of the said S. S. Warner first had and obtained; and, in case the said R. Armstrong shall, without such license and consent, discount any note or bill, he shall forfeit and pay to the said S. S. Warner 100*l.* for every such note or bill so discounted: And lastly, it is agreed by and between the parties hereto, that, in case the said S. S. Warner shall at any time during the continuance of this co-part-

nership advance a sum of money equal to that which the said R. Armstrong may at that time have engaged in the said trade or business of a pawnbroker, that then and in such case he the said S. S. Warner shall be entitled unto and receive an equal share and proportion of the profits arising therefrom, after deducting such a sum yearly as an allowance to the said R. Armstrong for his trouble in the management and conducting the said trade or business as any two persons in the trade may think an adequate compensation for such management. In witness &c."

Upon the back of this deed were indorsed, in the handwriting of R. Armstrong, various sums of money received by him of S. S. Warner, in the whole amounting to 4,300 ℓ .

The net annual profits of the business was supposed to be at the rate of about 12 $\frac{1}{2}$ per cent. In the summer of 1812, Robert Armstrong told J. O. Harrison, a witness examined on the part of the plaintiff, that he and S. S. Warner had a deed of partnership, and that Warner was a sleeping or private partner, and that his share of the profits was consolidated at the rate of 10 ℓ . per cent. according to the advances he had made; that no accounts were ever made out or examined or adjusted as declared by the said deed; and that the said R. Armstrong, after the making of such deed down to the time of his death, did not pay the said S. S. Warner at the rate of 50 ℓ . every three months, but paid him at the rate of 10 ℓ . per cent. per annum on the various sums advanced by him to the said R. Armstrong, and which said payments were entered in the books of the said R. Armstrong from time to time, thus:—"Paid Mr. Warner interest, &c." mentioning the amount in each entry.

Robert Armstrong afterwards died intestate; and after his death, viz. in or about the month of February, 1820, administration of his estate and effects was granted to Mrs. Betty Armstrong, his widow, and the said defendant. Mrs. Armstrong afterwards passed her account of the estate and

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effects of her late husband at the Legacy Office; and such account was made out by Mr. Walls (a witness examined on the part of the plaintiffs, and the attorney for S. S. Warner at the time of the administration granted, and up to the time of his death, and also attorney for the plaintiff,) from documents furnished by the defendant to him for that purpose. He also prepared an affidavit verifying the truth of such account, and which affidavit was duly sworn by the said Betty Armstrong; and the account, affidavit, and deed of partnership, were also produced at the said office for the inspection of the comptroller of the legacy duties. In this affidavit, the effects of the deceased were sworn to be under 200*l.* The inventory annexed stated the amount of assets to be 8,090*l.* 10*s.*; and the debts owing at the time of Armstrong's death (including the 4,300*l.* advanced by Warner) to be 7,926*l.* 18*s.* 2*d.*

On the part of the defendant, the evidence was to the following effect:—In the year 1810, and every succeeding year down to the death of Armstrong, an annual license for carrying on the said business of a pawnbroker at Baldwin's Gardens aforesaid, was taken and made out in the name of Robert Armstrong only; and he conducted and managed the business. Warner never was licensed to carry on the business of a pawnbroker either separately or jointly with Armstrong; and during all that period the name of Robert Armstrong alone was painted and appeared over the door of the premises at Baldwin's Gardens, where the business was so carried on, and the name of Warner was never inserted or used in any of the duplicate tickets, notes, or memoranda given out by Armstrong and his shopmen and servants upon the receiving of pledges of goods from customers; but, from the date of the deed of the 24th June, 1810, to the time of the death of Armstrong, the name of Armstrong alone was inserted and used in such duplicate tickets, notes, or memoranda, and during all that time Warner never ostensibly acted in the

conduct and management of the business, nor was he ever known either by the shopmen or servants assisting in the business, or by any person or persons dealing or coming to the shop on business, to be a partner therein with Armstrong; and no other person was known to them as the master or proprietor of the concern but Armstrong.

It is customary for pawnbrokers every year to take an account of the stock of goods and pledges being upon their premises, and for that purpose to call to their assistance pawnbrokers and others, *such persons not being interested in the particular stock to be taken.* From the time of making the deed of the 24th June, 1810, until the death of Armstrong, an account of the stock of goods and pledges on the premises at Baldwin's Gardens, where the business was carried on, was taken once in every year, by pawnbrokers and others, in different books, as the stock of Armstrong only. Warner himself occasionally assisted in taking such stock; and in the years 1811 and 1812 respectively, he signed memoranda in the following form:—

“The above sum formed part of the stock of Mr. Armstrong as taken by us this 30th day of June, 1811.

(Signed) S. S. Warner.

W. G. Perryman.”

On or about the 28th April, 1819, Armstrong made and executed a deed, whereby, after reciting a lease to him of the premises at which the business was carried on, and that he was possessed of certain stock in trade and pledges and other property, he assigned the same to T. Wood and S. S. Warner upon certain trusts—among others, “Upon trust to permit and suffer Betty Armstrong, the wife of the said R. Armstrong, to take and have the possession of the said premises, stock in trade, pledges, debts, shares, ready money, and securities for money, and all other property that the said R. Armstrong might be possessed of, interested in, or entitled unto at the time of his decease, to carry on *in her own name* the said trade and business that the

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said R. Armstrong then carried on or should at the time of his death carry on in his said shop and premises, during the continuance of the said lease, and so long as she should be and continue the widow of the said R. Armstrong, and to receive and take the profits of the said business for the support and maintenance of herself and such of the children of the said R. Armstrong, whether sons or daughters, under the age of twenty-one years, as may continue to live with her and be subject to her directions, &c."

About a month after the death of Armstrong, the stock was taken by various persons, when Warner and Wood were present, but declined to act in such stock taking, giving as a reason that they were interested in such stock as trustees; referring to the deed of trust.

Armstrong kept cash at Messrs. Nixon & Co.'s, bankers, during the time he carried on business at Baldwin's Gardens; and, after his death, Warner, as such trustee, on the 1st February, 1820, received 11s. 9d. from the said bankers, being the balance due to the estate of Armstrong. Mrs. Armstrong possessed herself of all the stock of goods and pledges then on the premises at Baldwin's Gardens. Administration with the said deed or will of the 28th April, 1819, annexed, was granted to her in the month of February, 1830; and Warner and his attorney, Mr. Walls, were her sureties on that occasion. The business was carried on in her name alone, and she had her name only over the door of the house of business. Warner never took possession of any part of the stock of goods or pledges on the premises or place of business; nor did he ever act or interfere in the management or conduct of the business, or assume any proprietorship over the same or the stock after administration had been so granted, though he assisted on some future occasions in taking stock in the same manner as he had done in the life-time of Armstrong, and in signing such stock taking as the property of the defendant only.

Some years after the death of Robert Armstrong, Warner made his will, dated the 30th April, 1827, in which he made the following recital:—

"Whereas Betty Armstrong, widow and relict of Robert Armstrong, of Baldwin's Gardens, Gray's Inn Lane, in the county of Middlesex, is and stands justly and truly indebted to me in the sum of 7,000*l.* and upwards, for principal money and interest, the principal whereof has been from time to time advanced by me to her for the purpose of enabling her to carry on the business of a pawnbroker; and inasmuch as I am apprehensive that the immediate calling in of so large a sum of money all together at my decease would be very injurious to her in her aforesaid business; it is therefore my earnest wish, and my will and desire, and I declare, order, and direct that my said trustees and executors for the time being do and shall, within three months next after my decease, adjust and balance my account with the said Betty Armstrong, and thereupon with her take an account of the stock then being on the premises of the said Betty Armstrong, and do from time to time continue to take an account of such stock when and so often as they may deem it necessary, and, if satisfied, on such stock taking, that there is and continues a good and sufficient security for the sum or balance due, do and shall allow the said sum of 7,000*l.*, or such other sum as may be found due at the time of my decease, to remain at interest at five per cent. per annum."

Whereupon the counsel for the defendant insisted—first, that, upon the several matters so produced and given in evidence as aforesaid, Warner, at the death of Armstrong, could not legally be considered as a partner of Armstrong, or entitled to receive payment at the rate of 10*%* per cent. on the capital advanced by him, out of the profits or effects of the concern—secondly, that, as such partner, he was not entitled to receive such payment on the said sum of 4,300*l.*, because, upon the several mat-

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ters so produced and given in evidence as aforesaid, no legal contract of partnership had been proved in relation to the trade of a pawnbroker carried on by Armstrong; and that Warner could not by law claim an interest as a partner in such trade carried on in the manner as shewn by the evidence in the cause and above set forth.

It was further insisted by the defendant's counsel, that a contract of partnership to be carried on in contravention of the statutes relating to pawnbrokers, particularly the statutes 1 Jac. 1, c. 21—25 Geo. 3, c. 48—and 39 & 40 Geo. 3, c. 99—and the stamp act relating to licenses, could not be a legal partnership; that the plaintiffs claiming upon the ground that a secret partnership existed between Warner and Armstrong in respect of the said trade of a pawnbroker carried on by and in the name of Armstrong alone under the circumstances stated in the evidence, such partnership was in contravention of the statutes referred to, and wholly unlawful; that Warner could not, under such contract of partnership, be legally a partner; and that a contract between two persons to carry on the trade of a pawnbroker in the name of one of such persons, under a license in the name of one only, and with the name of that one alone being painted over the door, and all the transactions in relation to the trade to be carried on in the name of such one person, was an illegal and void contract, and contrary to law. Therefore, it was insisted, that, upon these several grounds, the Lord Chief Baron ought to direct the jury accordingly.

His Lordship told the jury that the several acts of parliament cited did not in point of law furnish any impediment to the plaintiffs' recovering a verdict on the several issues; and he further stated that a person might as a partner, and a secret partner, and subject as such to the liabilities of a partner, receive more than five per cent. for money advanced by him to the concern. And, after referring the jury to the testimony of Harrison, told them

that such evidence, if they believed it, was material in favour of the plaintiffs; for, according to that witness, Mr. Armstrong had stated on two occasions to him that Warner was a sleeping or private partner, and that his share of the profits was fixed at a certain rate according to his advances. His Lordship afterwards directed the attention of the jury to a point insisted on by the defendant's counsel, viz. that Warner was never *known* to be a partner: this, he said, appeared to him to be an inconclusive fact; for, according to the stipulations in the deed, the business was to be carried on by Armstrong, and the servants were to be hired by him, and they were to be his servants. Possibly, said his Lordship, Mr. Armstrong might not wish it to be known that he had a secret partner who had advanced money in the trade; and a person who embarks money in a concern may also be desirous that the circumstance should not be known: that, however, will not make him the less a partner.

The defendant's counsel thereupon excepted to the direction of the Lord Chief Baron.

His Lordship having summed up to the jury, observed, that, as these were issues from a Court of Equity, it might be convenient that they should give their opinion upon the different points separately: and he left it to them to say—first, whether, at the death of Armstrong, Warner was legally to be considered as a partner of Armstrong—secondly, whether Warner was entitled to receive payment at the rate of 10*l.* per cent. on the capital advanced by him—thirdly, whether Warner was entitled to receive such payment out of the profits or effects of the concern—fourthly, whether or not Warner was entitled to receive such payment on the sum of 4,300*l.* The jury answered all these questions in the affirmative, and thereupon returned a verdict for the plaintiffs on both the issues.

The exceptions now came on for argument.

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Mr. Serjeant *Wilde* (Mr. Serjeant *Bompas*, and Mr. *Comyn* were with him), for the plaintiff in error.—The question to be considered is, whether a legal partnership subsisted between Armstrong and Warner, or whether the deed of partnership recited in the bill of exceptions was a mere design to cover an usurious contract. and, in order to disclose what was the real nature of the contract, recourse must be had to the terms of the deed and to the conduct of the parties. The stipulations contained in the deed are not such as would appear in the case of a bona fide partnership. The conduct of the parties in reference to the division of profits, the deed of assignment set forth in the bill of exceptions, and the will of Warner, are alike inconsistent with a partnership between them.

The business of a pawnbroker has from an early period been thought by the legislature to require special provisions for its regulation. Thus, the 1 Jac. 1, c. 21, recites the great increase of late in the members of that trade, the abuses that had consequently grown up therein, and the facility given by them to the utterance of stolen goods; and then proceeds to make certain enactments for remedy of these and other abuses. Further provision for the same purpose was made by the 3 Geo. 2, c. 24. By the 25 Geo. 3, c. 48, persons exercising the trade of pawnbrokers were required annually to take out a license for that purpose. The 3rd section of that act contained a general prohibition against carrying on the trade except under a license; and the 8th section provided that persons in partnership, carrying on the trade of a pawnbroker, should not be required to take out more than one license annually for carrying on trade in one house or shop. Then came the 36 Geo. 3, c. 87, which was followed by the 39 & 40 Geo. 3, c. 99 (the act now in force for the regulation of the trade). By the 6th section of that statute, the pawnbroker is required to give to the party pledging goods

with him a note in writing, describing the things pawned, upon which note are to be written or printed *the name and place of abode of the pawnbroker giving the same*. The 11th section prohibits the buying or taking in pledge of unfinished goods, or linen or apparel entrusted to others to wash or mend, and imposes for such offence a penalty of double the sum lent and the forfeiture of the goods; and the 12th section empowers peace officers to search for such goods. The 13th section likewise provides for the search of the premises of pawnbrokers unlawfully taking goods in pledge. The 14th relates to the redemption of goods. By s. 15, the pawnbroker is required, on payment of the sum advanced thereon and interest, to restore the goods pawned to the person producing the note. The 16th section regulates the mode of proceeding where the note has been lost. By ss. 17, 18 and 20, pawned goods are declared to be forfeited at the end of a year, and the mode of sale of unredeemed pledges is pointed out. Section 19 extends the period of redemption on notice to the pawnbroker. Section 21 prohibits pawnbrokers from purchasing goods while in their custody, &c. Section 22 requires every person and persons who shall follow and carry on the trade and business of a pawnbroker to cause to be painted or printed, in large legible characters, the rate of profit allowed by the act, &c., and to place the same in a conspicuous part of the shop where he, she, or they shall carry on such trade or business. Section 23, "for the better manifesting by whom the trade or business of a pawnbroker shall hereafter be carried on," enacts "That, from and after the commencement of the act, all and every person or persons who shall carry on the trade or business of a pawnbroker, shall cause to be printed or written in large legible characters over the door of each shop or other place by him, her, or them, respectively made use of for carrying on that trade or business, the Christian and surname or names of the person or persons so carrying on the said trade or business, and the word

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'Pawnbroker' or 'Pawnbrokers,' as the case may be, following the same"—under the penalty therein mentioned. The 26th section imposes general penalties against pawnbrokers offending against the act; and by the 31st section the act is extended to the executors and administrators of deceased pawnbrokers. In order to give effect to these regulations, the parties carrying on the trade must be known; all of them are incompatible with the existence of a secret partnership; particularly the provision in the 21st section prohibiting pawnbrokers from purchasing goods while in their custody—a provision that might easily be evaded by the dormant partner becoming the purchaser. The act has in view several great objects: among others, the protection of masters from the unlawful pawning of goods by their workmen and servants, the discovery of stolen property, to secure to persons pawning the due restoration of their goods, and to protect them from excessive charges for interest, and from other acts of extortion commonly practised by pawnbrokers. As all these objects are to be attained solely through the personal responsibility of the party, such responsibility would be totally withdrawn and the intention of the act frustrated by allowing pawnbrokers to contract secret partnerships, whereby men of substance are enabled to trade upon the irresponsibility of men of straw. The question here is, not as to what remedies exist in such cases against or in behalf of third persons, which is the question that has arisen in most of the decided cases on the subject; not whether the partnership quoad third persons be legal or not: but the dry question whether, where a general prohibition is imposed by statute against parties carrying on a particular trade except under certain regulations, those who contract engagements to contravene such statutory regulations can sue each other upon such illegal contract. In *Sullivan v. Greaves* (a), a case upon the sta-

tute 6 Geo. 1, c. 18, s. 12, Lord Kenyon said : " If a single name appears on the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a bona fide insurance, by saying to an innocent person, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract : it is a partnership pro hac vice; and this party cannot apply to a Court of justice to enforce a contract founded in a breach of that law." That case was confirmed by *Mitchell v. Cockburne* (*a*), where A. and B. engaged in a partnership in insuring ships &c., which was carried on in the name of A., who paid the whole of the losses—it was held that such partnership being illegal under the 6Geo. 1, c. 18, A. could not recover from B. a share of the money so paid. The same point was determined in *Aubert v. Maze* (*b*). So, where one of two partners underwrites policies of insurance upon ships &c. in his own name, but upon their joint account, contrary to the 6 Geo. 1, c. 18, s. 12, no action can be maintained to recover from the assured the premiums upon such policies—*Branton v. Taddy* (*c*) : nor, where the brokers have received the premiums, can the partners in whose names the insurances are effected recover them from such broker—*Booth v. Hodgson* (*d*). Another class of cases analogous to the present is that of contracts made on a Sunday, in contravention of the statute 29 Car. 2, c. 7, which contracts have been declared by numerous cases to be illegal and void—among others, *Drury v. De Fontaine* (*e*), *Smith v. Sparrow* (*f*), *Fennel v. Ridler* (*g*), and *Williams v. Paul* (*h*). In *Little v.*

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(a) *2 H. Blac.* 379.
 (b) *2 Bos. & Pull.* 371.
 (c) *1 Taunt.* 6.
 (d) *6 Term Rep.* 405.
 (e) *1 Taunt.* 131.
 (f) *12 J. B. Moore,* 266; *S. C.*

4 Bing. 84.
 (g) *8 Dow. & Ryl.* 204; *S. C.*
 5 Barn. & Cress. 406.
 (h) *4 Moore & Payne,* 532; *S. C.* 6 Bing. 654.

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Pool (*a*), it was held that a vendor of coals who had delivered to a purchaser a vendor's ticket not signed by the meter, contrary to the provision of the statute 47 Geo. 3, c. 68, could not recover from the purchaser the price of such coals. In *Law v. Hodgson* (*b*), it was held, that, the 17 Geo. 3, c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. So, in *Langton v. Hughes* (*c*), where the plaintiff, a druggist, after the 42 Geo. 3, c. 38, but before the 51 Geo. 3, c. 87, sold and delivered drugs to a brewer, *knowing that they were to be used in the brewery*, it was held that he could not recover the price of them. Mr. Justice Le Blanc there says: "It is an established principle that the Court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect any thing which is prohibited by law." The principle upon which these cases turned was that the regulations infringed were not mere fiscal regulations, but intended for the protection of the public against fraud. In *Gallini v. Laborie* (*d*) it was held that no action could be maintained for the breach of an agreement "to dance at the King's Theatre in the Haymarket, or at such other place as the plaintiff should appoint;" it appearing that no license for that theatre was granted by the Lord Chamberlain, as required by the statute 10 Geo. 2, c. 28, and that the plaintiff did not request the defendant to dance at any other place which was licensed. In *De Begnis v. Armistead* (*e*), it was expressly determined that any contract made in contravention of the provisions of a statute cannot be made the subject of an action. Lord Chief

(*a*) 9 Barn. & Cress. 192.

(*b*) 11 East, 300.

(*c*) 1 Mau. & Selw. 593.

(*d*) 5 Term Rep. 242.

(*e*) Ante, Vol. 3, p. 511; S. C.

10 Bing. 107.

Justice Tindal there said (*a*): "We can entertain no doubt that the agreement between the plaintiff and defendant was an illegal agreement. It was an agreement to become equal sharers in the profits to be derived from acting operas and ballets at a theatre not licensed according to the provisions of the statutes 10 Geo. 1, c. 28, and 28 Geo. 3, c. 30; and, from the language of part of the agreement we can feel no doubt but that it was known to both parties, at the time of entering into it, that any exhibition in such unlicensed theatre was a breach of the law. If, therefore, the bill of exchange had been given for the share of profits claimed by the plaintiff, or for the excess of advances made by the plaintiff on account of such illegal partnership, it is clear, upon the authority of *Mitchell v. Cockburne*, that the plaintiff could recover no part of his demand." The rule there laid down directly applies to the present case: for, here the plaintiff below seeks to recover a share of the profits of a business that has been illegally carried on in contravention of the statute—a share of the profits upon duplicates in respect of which he was under no responsibility; and the question is, whether the parties can under such circumstances call upon a Court of justice to interfere in the adjustment of their accounts. In *Marchant v. Evans* (*b*) and *Bensley v. Bignold* (*c*), it was held that an action for work and labor cannot be maintained by a printer for printing a work, unless his name and place of abode be printed in some part thereof, as required by the statute 39 Geo. 3, c. 79, s. 27. In the latter of these cases, Lord Chief Justice Abbott said: "I am of opinion that a party cannot be permitted to sue either for work and labor done or for materials provided, where the whole combined forms one entire subject-matter made in direct violation of the provisions of an act of

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(<i>a</i>) <i>Ante</i> , Vol. 3, p. 515.	Taunt. 142.
(<i>b</i>) 2 J. B. Moore, 14; S. C. 8	(c) 5 Barn. & Ald. 335.

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parliament." In *Stephens v. Robinson* (*a*), the Court of Exchequer acted upon the authority of *Marchant v. Evans* and *Bensley v. Bignold*. In *Meux v. Humphries* (*b*), it was held that where a brewer delivers beer to be used in a particular public house, he cannot make any person except the licensed keeper of the house *primarily* liable, so as to maintain an action for goods sold and delivered. So, here, the plaintiffs' testator having held Armstrong out to the world as the individual solely carrying on the trade, and the only person amenable to the provisions of the act, is estopped from coming into a Court of justice to enforce a claim to participate in the profits. [Mr. Justice *J. Parke*.—The doctrine laid down by Lord Tenterden in *Meux v. Humphries* is still under discussion. His Lordship ruled in conformity with that case in *Brooks v. Ward*, on the Home Circuit, and the Court of King's Bench granted a rule upon it, which is now pending.] Throughout all the cases this principle will be found to prevail, viz. that, where the prohibition has for its object the public benefit, any contract made in furtherance of a breach of the law is void; but otherwise where the breach is of a mere fiscal or revenue regulation protected by penalties—as in *Johnson v. Hudson* (*c*), *Hodgson v. Temple* (*d*), and *Brown v. Duncan* (*e*). Here, the Lord Chief Baron, in his direction to the jury, was incorrect in stating that the statutes regulating the trade of pawnbrokers did not prevent the plaintiffs from recovering in this action.

The *Solicitor General* (Mr. *Hutchinson* was with him), contra.—The only question that arises upon the exceptions taken to the ruling of the Lord Chief Baron is, whether

(*a*) 2 Cromp. & Jerv. 209.

(*d*) 5 Taunton, 181; S. C. 1

(*b*) 1 Moody & M. 132; S. C. Marsh. 5.

3 Car. & P. 79.

(*e*) 10 Barn. & Cress. 93.

(*c*) 11 East, 180.

or not the statutes referred to operate an absolute bar to the maintenance of this action. The jury have found, that, at the death of Armstrong, Warner was a dormant or secret partner with him, and that such partnership was bona fide. No question of fraud, therefore, can now be agitated; and the point is to be considered as if it had arisen between Warner and Armstrong. It is conceded on the other side, that, quoad third persons, Armstrong and Warner were partners: and the jury have found that they were also partners inter se. There is nothing in secret partnerships contrary either to law or to morality. Contracts of that nature are recognized in all mercantile countries. The defendants in error contend—first, that there has been no infraction of the law in the mode in which the business has been carried on—secondly, that, even if there were, there was no express agreement for such infraction, and therefore, although the parties might have subjected themselves to certain penalties imposed by the statute 39 & 40 Geo. 3, c. 99, still the contract is not rendered void.

1. The statutes apply only to those who really take a part in carrying on the business, and not to a dormant partner. There are many trades in which parties are required by various statutes to take out annual licenses and to have their names painted over their doors. The consequences would be most fearful if the Court were to hold (as they must in effect do if the exceptions taken in this case be supported) that a dormant partner, taking no part in the conduct or management of the business, and perhaps residing at a great distance from the place where it is carried on, is nevertheless liable to all the penalties imposed by the legislature for the breach of these regulations, and is also deprived of his remedy against his partner for enforcing the performance of the agreement between them. All the decisions that have hitherto taken place on the subject apply only to those by whom the

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trade has actually been carried on. The first case is that of *Raynard v. Chase* (*a*), which was determined upon the statute 5 Eliz. c. 4, s. 31, which enacts that "it shall not be lawful to any person or persons other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use, or exercise any craft, mystery, or occupation now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at the least as an apprentice, &c.," under a penalty of forty shillings per month—it was held that one not qualified to exercise a trade himself, by having served an apprenticeship, entering into partnership with a qualified person, and only sharing the profits and standing the risks of the partnership, without ever interfering in the trade personally, was not within the statute. That case was recognized in *Keene v. Dodderidge* (*b*), though, the Court being divided in opinion, no judgment was given. Lord Ellenborough and Mr. Justice Bayley held, that, as the party had not actually interfered in carrying on the trade, he was not liable for the penalties. In *Candler v. Candler* (*c*), an attorney having died and bequeathed all his property to his widow, his eldest son, for the mixed consideration of the good will of the business, the advancement of money for carrying it on, and family affection, entered into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters: it was held that this arrangement was not contrary to the policy of the statute 22 Geo. 2, c. 46, s. 11. The Vice Chancellor (Sir John Leach) said: "It appears by the preamble to this clause that the mischief which the legislature had in view was, that unqualified persons, by the assistance or connivance of regular attorneys, were enabled to act and practise as attorneys, to the prejudice

(*a*) 1 Burr. 2.(*b*) 15 East, 161.(*c*) 6 Mad. 141.

of his majesty's subjects and the scandal of the profession ; when therefore it is provided that an attorney shall not permit or suffer his name to be in any way made use of upon the account or for the profit of any unqualified person, the plain purpose is that he shall not by any shift or contrivance enable an unqualified person to act or practise in his name. The deed in question does not enable any unqualified person in any manner to act or practice as an attorney. It is simply a grant of a moiety of the profits made by the sole acting of the attorney himself during a certain period, for the mixed consideration of the good will of the business, the advance of money, and family affection, and is neither within the mischief nor the words of the statute." [Mr. Justice Park referred to *Williams v. Jones* (a) and *Hopkinson v. Smith* (b).] In both these

(a) 7 Dow. & Ryl. 548; S. C. 5 Barn. & Cress. 108. By a memorandum, dated in November, 1822, A., an attorney, agreed with B. for a valuable consideration, to take C. (the son of B.) into partnership as attorneys and solicitors for ten years, and to allow him a moiety of the profits. The memorandum did not state when the partnership was to commence. C. was not admitted an attorney until April, 1823, but he conducted the business in the name of A. from the beginning of January, 1823. In an action by A. against B. for part of the consideration money, it was held that the agreement, though legal on the face of it, upon proof that C. had not been admitted an attorney until after its execution, became illegal within the 22 Geo. 2, c. 46, s. 11, and void.

(b) 7 J. B. Moore, 237; 1 Bing.

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13. In an action on an attorney's bill, it appeared that the plaintiff lived at D., five miles from W.; that the defendant lived at H., fourteen miles from W., and applied to J. B. (who resided at W., and who had been a clerk of the plaintiff's, and practised in his name,) to carry on the suit for which the bill in question was incurred; that J. B. did so; that the business done at the office at W. was for J. B.'s benefit, with the exception of a third which the plaintiff received for attending at W. once a week; that the plaintiff's name was not on the door at W., nor was he employed by J. B. in soliciting business; but that J. B. frequently consulted with the plaintiff, and drafts were sometimes engrossed at D. for the office at W.; and that the draft of the brief in the suit which J. B. had carried on for the de-

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cases, the agreements were void—the business was conducted by the unqualified parties. Here, Warner in no respect violated the statute: dormant partners could not be intended to be included in it. One who does not interfere with its management cannot be said to exercise a business: nor can a dormant partner of a pawnbroker be said to take in a pledge; he has no possession of the goods pledged; and it would therefore be absurd to hold that the legislature intended that he should be compellable to deliver up property of which he never was or could be possessed. The Court will be slow to come to the conclusion that Warner was subject to all the penalties imposed by the statute for acts of commission or omission over which he had no control.

2. Even supposing Warner to have been guilty of an infraction of the law in having omitted to obtain a license to trade as a pawnbroker or to have his name painted over the shop door or printed on the tickets issued to the pledgers of goods, still the partnership was legal, and not void by reason of such infraction of the law. Had it been expressly stipulated in the deed that Warner should not take out a license, and should not have his name over the door or on the tickets, then it must be admitted that the agreement would have been illegal and void. In the case of *Raynard v. Chase*, the name of Chase was in the license. Consistently with the deed in this case, the name of Warner might have been inserted in the license: there is no contract that the business should be carried on in the name of Armstrong alone.

Mr. Serjeant Wilde, in reply.—*Raynard v. Chase* was determined with reference to the very doubtful policy of the provisions of the statute 5 Eliz. c. 4. The ground of

fendant was in the handwriting of the plaintiff, as were also some items in J. B.'s books touching

that suit: it was held that a non-suit directed by the Judge who tried the cause was proper.

the decision there was that the defendant did not interfere with the conduct of the trade; and therefore the Court said he had not done that which it was the object of the act to prohibit. Here, the situation of the party is such, that, while he enjoys a very large proportion of the profits of the business, he escapes the liability that the statute intended to impose upon him. It is an essential part of the policy of the act that there shall not be dormant partners in the trade of pawnbrokers; and the authorities clearly establish that a partnership entered into for illegal purposes is void even as between the parties themselves.

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Lord Chief Justice DENMAN now said that it occurred to several of the Judges that the exceptions not having been properly taken (*a*), judgment could not be given upon that record: and further, that it did not appear upon the bill of exceptions that any contract had been entered into between the parties to contravene the law—a fact which ought to have been found by the jury. His Lordship also observed that it might nevertheless be proper to state it as the opinion of all the Judges who had assisted at the argument, that, if there were any such express agreement between the parties having for its object the contravention of the statute, such agreement would be void, and would confer no rights upon either party.

(a) They were placed in the bill of exceptions after the finding of the jury.

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Tuesday,
Nov. 26th.

A sheriff who seizes the effects of a trader under a f. fa. issued after a secret act of bankruptcy, of which he had no knowledge, and sells them, is liable for the value of the goods so seized and sold, in an action of trover at the suit of the assignees appointed under a commission subsequently issued against such trader.

GARLAND v. CARLISLE, Assignee of G. V. LEONARD, a Bankrupt.

THIS was an action of trover brought by the plaintiff below, assignee of the estate and effects of one Thomas Valentine Leonard, a bankrupt, to recover the value of certain goods that had been seized by the defendant below, late high sheriff of the county of Dorset, under an execution issued at the suit of one Joshua Payne. The cause was tried before Mr. Justice Littledale, at the Summer Assizes at Dorchester, in the year 1826, when the jury returned a special verdict to the following effect:—

That George Valentine Leonard at the time of the committing of the act of bankruptcy and the issuing of the commission thereafter mentioned, was a trader within the intent and meaning of and subject to the statutes made and then in force concerning bankrupts, and that there was then a good petitioning creditor's debt. That the said George Valentine Leonard, on the 15th of October, 1824, committed an act of bankruptcy. That, on the 15th of December, in the same year, a writ of f. fa. issued out of his Majesty's Court of King's Bench, tested the last day of Michaelmas Term preceding, returnable on Monday next after eight days of St. Hilary then next, and directed to the sheriff of Dorset, commanding him, that, of the goods and chattels of the said George Valentine Leonard, he should cause to be levied, as well a certain debt of 60*l.*, which Joshua Payne had recovered against him in the Court of King's Bench, as also sixty-five shillings for his damages, as well by reason of the detaining of that debt as for his costs and charges; which said writ was indorsed to levy 30*l.*. 1*s.*. 6*d.*, besides sheriff's fees, poundage, officers' fees, and all other incidental expenses. That, on the 16th day of the said month of December, the said

writ was delivered to Mr. William Parr, at that time under-sheriff to the defendant, who was then sheriff of Dorset, by John Williams, an agent of the said Joshua Payne, together with a letter from Green & Ashurst, his attorneys, a copy whereof is as follows:—

“ Sir,—The bearer, Mr. Williams, will deliver a writ of fi. fa. to you, which we have issued against the goods of Mr. George Valentine Leonard, and upon which you will be pleased to grant a warrant to an officer living near to Lyme. We authorize you and the officer to take Mr. Williams's directions on the subject of this execution, and to withdraw from possession, if he shall think fit to request you so to do.”

That, on the 17th of that month the defendant issued his warrant, directed to William Restarick, his bailiff, reciting the said writ, and commanding him to levy of the goods and chattels of the said George Valentine Leonard, as required by the said writ, that the said sheriff might have the money, as by the same he was commanded. That the said warrant was delivered by the said John Williams, the agent of the said Joshua Payne, to the said William Restarick, together with a letter from the said William Parr, as under-sheriff as aforesaid, to the said William Restarick, a copy of which is as follows:—

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“ Sir,—Inclosed is a warrant to levy on the defendant's property, which I send you by Mr. Williams, whose directions you will take in the execution of the warrant; and if he requests you to withdraw the execution, you will do so, on his giving you a written authority.

That Restarick, on the 17th day of December, in the year last aforesaid, entered the said George Valentine Leonard's house and premises at Lyme, in the county of Dorset, and there seized and took divers goods, in the declaration mentioned, which were the goods of the said

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George Valentine Leonard, but which, by the subsequent commission of bankrupt and assignment, became the property of the plaintiff, by relation from the act of bankruptcy, of the value of 450*l.*, under and by virtue of the same writ, putting Robert Gascoigne, his assistant, in possession, and leaving with him the warrant; and he kept possession of the same till the 24th day of the same month. That, whilst the said Robert Gascoigne was so in possession as the assistant of the said William Restarick, divers goods, parcel of the said goods in the said declaration mentioned, of the value of 445*l.*, which were the goods of the said George Valentine Leonard, but which, by the subsequent commission of bankrupt and assignment, became the property of the plaintiff, by relation from the act of bankruptcy, were made up into thirteen packages, which the said William Restarick understood were packed for the purpose of satisfying the levy, in pursuance of an arrangement made between the said John Williams and the said George Valentine Leonard, eight of them to pay the debt due from the said George Valentine Leonard to the said Joshua Payne, and the remaining five of them to be sold by the said Joshua Payne for the sheriff's poundage, officer's fees, and other expenses which the said John Williams, as such agent, should have incurred, or might incur, in and about the said levy; the surplus balance to be remitted to the said George Valentine Leonard. The greatest part of these goods had been originally purchased by the said George Valentine Leonard of the said Joshua Payne; but, some few of the goods so purchased having been sold, the value of them was made up out of the said George Valentine Leonard's stock; but the said Joshua Payne had not by this arrangement any more than his just debt. That, after such arrangement had been so made between them, on the 24th day of the same month of December, the said John Williams, agent for the said Joshua Payne, delivered to the said William Resta-

rick two letters, one dated the 23rd day of December, 1824, signed by the said George Valentine Leonard, and directed to the said William Restarick, as follows:—

“ I request and empower you to take goods instead of cash to the amount of the levy in the above cause.”

And the other, dated Lyme, 24th December, 1824, signed by the said John Williams, as follows:—

“ I hereby authorize and request you to quit possession, the plaintiff having been satisfied the whole debt and costs in this action.”

The said execution was afterwards, on the said last-mentioned day, wholly abandoned; and the said Robert Gascoigne and the said William Restarick quitted the premises of the said George Valentine Leonard, leaving all the said goods thereon; the said Robert Gascoigne going to Bridport, and taking the said warrant with him, and the said William Restarick to the Cups Inn at Lyme, That, two hours after, the said John Williams, the agent of the said Joshua Payne, came to the said William Restarick, at the Cups Inn, to settle with him for the sheriffs' poundage, and his the said William Restarick's expenses for inventory, holding possession, levying, and other expenses, which was done, and was the first time they had been adjusted; and the said John Williams paid to the said William Restarick the whole thereof, except 5*l.*, which he did not pay; but, instead thereof, he, the said John Williams and the said William Restarick agreed that the said John Williams should cause goods to the amount of 5*l.* to be packed up and sent to Bridport, to the said William Restarick, to be deposited with and kept by him till the said 5*l.* should be remitted to him. That a quantity of goods, of the value of 5*l.*, being the residue of the goods mentioned in the declaration, was accordingly fetched from the shop of the said bankrupt, by Dudley, and by Farrant, a shopman of the said bankrupt, and sent to the Cups Inn, and was afterwards, on the following Monday, the 26th of

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December, in the same year, received by the said William Restarick, at Bridport, by the Lyme carrier. That the said £l. were about two months after paid to the said William Restarick, who forwarded the said package of goods about the same time that the money was paid, by the van to London, to the said Joshua Payne. That the said William Restarick, at the time he received the same quantity of goods, knew that they were part of the goods which had been so seized as aforesaid. That the said thirteen packages of goods were, after the said execution was so abandoned as aforesaid, on the same day, sent by the said John Williams, as such agent as aforesaid, from the said house and premises of the said George Valentine Leonard to the Cob at Lyme, each of them being marked with the letters J. P., being the initials of the said Joshua Payne's name, and thence shipped for London, addressed "J. P., Carpenter Smith's wharf," and were directed by the said John Williams to be sent to 34, Old Change, for Joshua Payne. That they were sent, together with four other packages of goods which had been sent to the Cups some days before the execution, and are not the subject of the present action, making seventeen packages in the whole. That they were landed, on their arrival in London, at Carpenter Smith's wharf, whereof Richard Wilson was the wharfinger. That, on the 8th of January, 1825, a commission of bankruptcy issued against the said George Valentine Leonard, under which he was, on the 14th of the same month, declared a bankrupt. That, on the 29th of the same month, an assignment of the estate and effects of the said bankrupt was made by the commissioners, under the said commission, to the said plaintiff. That, in the beginning of February, 1825, Mr. Henry Ball asked the said Richard Wilson if he would deliver the said seventeen packages of goods to him, who said, "Certainly not, until it is ascertained in a Court of law to whom they belong;" and

they still remained at the said wharf, in his possession. That, on the 15th of June, 1825, at Poole in Dorsetshire, the said plaintiff demanded the goods mentioned in the declaration of the said defendant, who referred him to Mr. Parr, his under-sheriff. That the said plaintiff soon after seeing the said defendant and the said Mr. Parr together at Poole, in the said county of Dorset, asked the said Mr. Parr, in the presence of the said defendant, whether it was his, the said Mr. Parr's, intention to comply with the terms of the same demand, or not; to which the said Mr. Parr answered, "No, certainly not."

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Upon this special verdict, the Court of Common Pleas gave judgment for the plaintiff below (*a*), and the defendant brought a writ of error. The case was argued in Trinity Term last, by Mr. *F. Pollock* for the plaintiff in error, and Mr. Serjeant *Bompas* for the defendant in error. The Court took time to consider; and, there being a diversity of opinion among them, they now delivered their judgments *seriatim*.

Mr. Baron GURNEY.—The point on which this question turns has lately undergone the consideration of the Court of Exchequer, in the case of *Balme v. Hutton* (*b*), and of this Court, composed of the Judges of the Courts of King's Bench and Common Pleas, in the same case (*c*), on a writ of error from the judgment of the Court of Exchequer, on which latter occasion the judgment of the Court of Exchequer was reversed upon the opinions of six of the Judges—my Brother Gaselee dissenting from them, and adhering to the opinion of the Court of Exchequer. Differing, as I must, from great authorities, on which side soever I form my opinion, I have considered the

(*a*) 5 *Moore & Payne*, 102; (*c*) *Ante*, Vol. 3, p. 1; S. C. S. C. 7 *Bing.* 298. 1 *Cromp. & M.* 262.
 (*b*) 2 *Cromp. & Jerv.* 19.

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question most anxiously; I have examined every case upon the subject again and again; I have read and deliberated on the judgment of the Court of Exchequer pronounced by Lord Lyndhurst, and also upon the several judgments pronounced by my learned Brothers in this Court. I trust I feel the diffidence which I ought under these circumstances to feel, in forming any opinion upon the question; yet I must deliver the opinion which in the result I have formed, and in which I have been much assisted by the ample and able discussion which this question has undergone: that opinion is in favour of the defendant in error. It is difficult, if not impossible, to add any thing to the arguments of the several learned Judges upon this subject with whom I agree; I will, however, briefly state the grounds of my opinion:—

As this is a question arising on an act of parliament, it is requisite to look at the act itself. The statute 13 Eliz. c. 7, empowers the Lord Chancellor, by commission under the Great Seal, "to appoint persons who shall have full power and authority to take such order and direction with the body of the bankrupt, as also with his land, and also with his money, goods, chattels, wares, and merchandizes, and debts, wheresoever they may be found or known, and cause them to be appraised to the best value they may, and to make sale of the same, or otherwise to order the same, for true satisfaction and payment of the creditors." This is a plain, clear, and distinct enactment. The first question is, what is the property of the bankrupt respecting which the commissioners are to take order? The answer, it appears to me, must be, the property which the bankrupt had at the time he became bankrupt. The fact of his being bankrupt is not publicly known at the time it takes place; it is ascertained at a subsequent period. A commission issues, adjudication is made, assignees are appointed, to whom the bankrupt's property is assigned, and whose title to the bankrupt's property re-

lates back to the time of the bankruptcy; there is no period short of the bankruptcy which can be predicated of as the commencement of their title. It cannot be necessary to cite cases to establish a principle which is so well settled and acknowledged. This relation back is absolutely necessary for the prevention of fraud. Unquestionably it often produces great hardship to individuals; if that were not known when the statute passed, it has become known in a thousand instances since; and, in particular cases, the application of the rule has been restrained, not by the Courts of law, but by the legislature. Where exceptions have not been introduced, the rule has been considered as inflexible. If the assignees have therefore a title to the property of the bankrupt, it appears to me to be a necessary consequence that they must be entitled to follow that property whithersoever it goes, and must have a right of action against any person who converts it; otherwise it is impossible that they can make due distribution among the creditors. It is admitted that this is so with respect to judgment creditors; but it is said that this being an action against the sheriff, rests upon a different principle. In this case, at a period when the fact of the bankruptcy was not known (although it had taken place), the defendant, the sheriff, who was commanded to take the goods of Leonard, the bankrupt, took goods which had belonged to Leonard, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee, and converted them by handing them over to the judgment creditor. The defendant contends that he is not liable to this action of trover, because he is a public officer; that he was called upon to execute the process of the law; and that, at the time he executed it, he had no reason to doubt that the goods which he found in the possession Leonard were his property. I admit the hardship, and regret that it exists; but the legislature has not made any exception in favour

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of a public officer under these circumstances; and I think that a Court of law cannot supply that omission. This is the best opinion that I can form upon the act of parliament itself; and this would be my judgment were the case *res integra*.

The next question is, whether this act of parliament has, in all times, received a contrary exposition. If an act of parliament more than two centuries old has received one uniform construction, it would perhaps be more safe to yield to that construction (even though it should not be quite satisfactory), than, by making a change, to unsettle the opinions and the practice of the profession and of the public. But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance with my own conviction. On the contrary, I find the cases and the practice for a period of nearly eighty years in favour of the construction which I have given; and the older cases, upon which reliance is placed for the opposite construction, appear to me to be of doubtful authority.

The first case which is relied upon in the judgment in the Court of Exchequer, is that of *Bailey v. Bunning* (a). This case is very imperfectly and confusedly reported. It was an action of *trover*; yet, if we can trust the reports, the discussion that took place would rather have induced the supposition that it had been considered an action of *trespass*. The finding of the jury, indeed, appears to have proceeded upon that supposition; for, they submit the question to the Court upon the taking by the defendant, which would have been the question if the action had been *trespass*, but certainly was not the question when the action was *trover*. At the time that the case of *Balme v. Hutton* was before the Court of Exchequer, it was supposed that the jury in *Bailey v. Bun-*

(a) 1 Lev. 173; 1 Sid. 271; 2 Keb. 32, 33.

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ring had found the conversion; the postea had not then been transcribed, and the Court had no other information respecting it than the reports afforded. But, before the case came on in this Court upon the writ of error, the postea was transcribed, and it then appeared, that, although the jury found both the demand and the refusal, they did not find the conversion. Now, the demand and refusal, although evidence of a conversion, do not amount to a conversion; that omission the Court could not supply; and it was expressly found that the goods remained in the hands of the sheriff. Consistently with the opinion which leads me to give judgment in favour of the defendant in error in this case, I should have had no difficulty in giving judgment for the defendant in that. Considering the actual finding of the jury, the discussion that took place, and the imperfect reports with which we are furnished, I cannot but think that much more importance has been ascribed to this case than it deserves. The next case is *Lechmere v. Thorogood* (a). This was an action of *trespass*; and all that the Court was called on to decide was, whether trespass would lie; and they held that it would not. I agree entirely with the decision in that case, that trespass would not lie. The bankrupt could not bring the action, for his property in the goods had ceased. The assignee could not bring the action, because *possession*, real or constructive, is necessary to sustain an action of *trespass*; and he had neither. His *property* related back, because the statute had given it to him, but the statute had not given a relation of *possession*. An action of *trover* was afterwards brought, and the plaintiff again failed; and Shower, in his report, says it was decided, that, having brought *trespass* and been defeated, *trover* could not then be sustained. Another reporter says the case was adjourned; but it is probable that Shower was

(a) 3 Mod. 236; 1 Show. 12; Comb. 123.

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right, because he speaks with some exultation on his poor widow having been quit of them at law in both Courts. The Court did not decide that *trover* could not have been maintained if that had been brought first. Whether the Court decided rightly that the judgment for the defendant in *trespass* was a bar to the action of *trover*, it is not necessary to inquire. But why an action of *trover* for converting the property of the assignees on the 1st of February should not be sustainable, because it had been decided that an action of *trespass* for entering and taking those goods upon the first of January could not be sustained, I confess that I cannot see; the evidence in the one case would be materially different from the evidence in the other. The next case is *Cole v. Davies* (*a*), which at best is but a *Nisi Prius* case. Its authority is materially detracted from by the observation of Lord Mansfield in *Cooper v. Chitty* (*b*), that it was one of those notes which were taken by Lord Raymond when he was young, as short hints for his own use, but too incorrect and inaccurate to be relied on as authorities. And if Lord Raymond in taking his note omitted but two words, the law laid down will be unquestionable. If Lord Holt said (as probably he did say), not that no action will lie, but "no action of *trespass* will lie against the sheriff, because he obeyed the writ," then this case will not be inconsistent with what I conceive to be the law. These cases appear to me to be but slender authority for deciding that the sheriff shall not be answerable for converting the property of the assignees of the bankrupt, under a warrant to levy on the goods of the bankrupt. The last of those cases occurred in the year 1698; and there does not appear to be any thing to fill up the chasm between that case and the case of *Cooper v. Chitty*, which was

(*a*) 1 Ld. Raym. 724.

(*b*) 1 Burr. 20; 1 Sir W. Blac. 65; 1 Lord Kenyon's Notes, 395.

decided in the year 1756, immediately after Lord Mansfield had taken his seat as Chief Justice of the Court of King's Bench. It has in the consideration of this question excited some surprise in my mind that the case of *Cooper v. Chitty* should have raised so much doubt as to induce the Court to call for a second argument; but we learn from Sir James Burrow that second arguments were at that time much more common than they have been since; and that they were allowed, if pressed for by counsel, even though the Court themselves entertained no doubt. The case of *Cooper v. Chitty* was very fully argued; the Court took time to consider, and Lord Mansfield pronounced an elaborate judgment (*a*). Sir James Burrow's report of the judgment upon the general question of law, and the distinction between trover and trespass, is as follows:—"The general question is, whether or no the action is maintainable by the assignees against the defendants, the sheriffs, who have taken and sold the goods. It is an action of trover. The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution of the question in this particular case. In form, it is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies and has been brought in many cases where in truth the defendant has got possession lawfully. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it. This is an action of tort, and the whole tort consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action—first, pro-

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(a) 1 Burr. 31; 1 Ld. Kenyon, 417.

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perty in the plaintiff—secondly, a wrongful conversion by the defendant. As to the first, it is admitted in the present case that the property was in the plaintiffs as on and from the 4th of December (which was before the seizure), by relation. This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal). They make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy. Dispositions by process of law are put upon the same footing with dispositions by the party. To be valid, they must be completed before the act of bankruptcy. Till the making of 19 Geo. 2, c. 32, if the bankrupt had bona fide bought goods or negotiated a bill of exchange and thereupon or otherwise in the course of trade paid money to a fair creditor after he himself had committed a secret act of bankruptcy, such bona fide creditor was liable to refund the money to the assignees after a commission and assignment; and the payment, though really and bona fide made to the creditor, was avoided and defeated by the secret act of bankruptcy. This is remedied by that act, in case no notice was had by the creditor (prior to his receiving the debt) that his debtor was become a bankrupt, or was in insolvent circumstances. Therefore, as to the first point, it is most clear that the property was in the plaintiff as on and from the 4th of December, when the act of bankruptcy was committed.—Secondly, The only question then is, whether the defendants are guilty of a wrongful conversion. That the conversion itself was wrongful, is manifest. The sheriffs had no authority to sell the goods of the plaintiffs, but of William Johns only. They ought to have delivered these goods to the plaintiffs, the assignees.

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Upon the foundation of the legal right, the Chancellor, even in a summary way, would have ordered them to be delivered to the assignees. It is admitted, on the part of the defendants, that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that Godfrey, the plaintiff, would have no title to the money arising from such sale; but, if he received it, would be liable to an action to refund. If the thing be clearly wrong, the only question that remains is, whether the defendants are excusable, though the act of conversion be wrongful. Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees, by relation, in order to an equal division of his estate among his creditors; yet they do not make men trespassers or criminal by relation who have innocently received goods from him, or executed legal process, not knowing of an act of bankruptcy. That was not necessary, and would have been unjust. The injury complained of by this action, for which damages are to be recovered, is, not the seizure, but the wrongful conversion." "The sheriff acts at his peril, and is answerable for any mistake: infinite inconveniences would arise if it were not so." Lord Mansfield adverts to the cases of *Bailey v. Bunting*, *Leckmere v. Thorogood*, and *Cole v. Davies*, and then observes: "The fallacy of the argument from the authority of these cases, turns upon using the word 'lawful' equivocally, in two senses. To support the act, it is not lawful; but, to excuse the mistake of the sheriff, through unavoidable ignorance, it is lawful; or, in other words, the relation introduced by the statutes binds the property; but the men who act innocently at the time are not made criminals by relation, and therefore they are excusable from being punishable by action or indictment as trespassers. What they did was innocent, and in that sense lawful; but, as a ground to support a wrongful con-

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version by sale, after a commission publicly taken out and an actual assignment made, it was *not* lawful." In a subsequent part of his judgment Lord Mansfield says (*a*): "As to the case of *Cole v. Davies* and another, reported in 1 Lord Raymond, 724, 'That no action will lie against the sheriff, who, after the bankruptcy, seizes and sells the goods under a fieri facias to him directed' (which is there said to be ruled by Lord Chief Justice Holt at Nisi Prius, in Hilary, 10 Will. 3)—These notes were taken in 10 Will. 3, when Lord Raymond was young, as short hints for his own use. But they are too incorrect and inaccurate to be relied on as authorities." He further says (*b*):—"There are much greater hardships upon other third persons concerned in pecuniary transactions with bankrupts, which hardships they are nevertheless left subject to, because it was necessary that they should be so in order to secure the end and intention of the act relating to bankrupts, namely, the securing their effects for the equal satisfaction of their creditors." The judgment of Lord Mansfield upon this head, is thus reported by Lord Kenyon (*c*): "The general question is, whether this action is maintainable by the assignees against the defendants, the sheriffs. The action of *trotter* is in form a fiction, but in fact and substance a remedy given the subject to recover a personal property. The very form of the count supposes that the defendant may come lawfully by the possession of the goods; and, wherever a defendant gained such possession wrongfully, the plaintiff, by bringing this action, waives the trespass: so that, if, on demand, the defendant delivers the thing to the plaintiff, no damages can be recovered in this action. It is called in our law an action of tort, but the conversion is the whole tort. Two things are necessary for a plaintiff to prove in this action—first, property in himself—secondly, a wrongful conversion by

(*a*) 1 Burr, 36.

(*b*) Id. 37.

(*c*) 1 Ld. Ken. 417.

the defendant. In the present case, it is admitted that the property of these goods was by relation in the plaintiffs as on and from the 4th of December, which was before the seizure; and was most notoriously in them on the 8th, when the assignment was made, which was long before the sale. This property by relation assignees derive under divers acts of parliament whereby bankrupts are divested of their property from the time of the act committed. They make the assignment good against all who claim by or under the bankrupt after the bankruptcy committed; and it is good against all executions not executed before the act of bankruptcy; and the disposition of the law is in the same condition as the disposition of a private person. Before 19 Geo. 2, if a bankrupt had bought bills of exchange, or goods, after the act of bankruptcy committed, and paid money for them, the seller was liable to refund this sum to the assignees; but this is remedied by that statute; though still, if the party had notice, the relation shall stand. If a bankrupt sells goods and receives the money, the sale is void; and all acts are rescinded from the bankruptcy committed: these statutes vesting the property in the assignees, do not, however, make purchasers *trespassers* to the assignees, so as to be subject to an indictment or action of trespass, for they act innocently. Nothing, then, can be clearer than that the property was in the plaintiffs before the writ of *fi. fa.* was executed; so that the only question is, whether the defendants are guilty of a wrongful conversion; and that may be considered in two lights—first, whether the conversion itself be wrongful—secondly, whether the defendants are excusable. As to the first, that the conversion is wrongful, is manifest. The defendants had no authority to sell the goods of a third person; and these goods ought to have been delivered up to the assignees. I have known applications in Chancery above a hundred times for sheriffs to return the goods or pay the money. That the act was

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injurious appears clearly from this, that the vendee could have no title; for, a sale cannot be lawful which gives no title to the purchaser. In this case an action would lie against the purchaser. The end for which the goods are sold is, that the money may be paid to the plaintiff in the original action; here it was making a sale which could not stand, and applying the money to him who cannot hold it." He further says (*a*): "The only question, as I said before, here is, upon the tortious conversion; for, the action supposes a rightful possession; so that it is very clear that the plaintiffs are entitled to judgment." Lord Mansfield then considers the argument for the defendant, and the case of *Bailey v. Bunning*, which had been cited; and observes that the "mistaking those cases arises from the imperfection and abuse of words. Those cases determine that the taking of the goods is lawful; if lawful, it was argued that the execution was well begun and must be completed. But how was the seizure lawful? Is it meant that it was lawful as against the assignees, or in any sense to change the property? Clearly not; for, the assignees will pursue and avoid every disposition, even in market overt. No more can be meant than this, that the sheriff, not knowing any thing of the secret act of bankruptcy, or that any commission would ever be taken out, shall not be punished as a wrong-doer for the taking; which, though not lawful against the assignees, yet was innocent and excusable." And he adds (*b*): "All the other cases do but follow that of *Bailey v. Bunning*, in which there was a long question about the relation of the teste; and besides that, another, namely, whether the taking was lawful. The Court, in determining it, plainly considered no more than whether the defendant was a trespasser or not; and they all agreed that what he had done was lawful, for he, being an officer, was obliged to execute the writ, not knowing of the act of

(a) 1 Ld. Ken. 419.

(b) Id. 421.

bankruptcy, or that a commission would be ever taken out. In the case of *Phillips v. Thompson* (a), it appears that the case of *Basley v. Bunning* was resolved only in excuse of the bailiff for executing the writ. The same case is reported in Siderfin very shortly, and the reporter seems to have been confused, and not to distinguish between the cases of trover and trespass. The next case is that of *Lechmere v. Thorogood*, in Shower, which was trespass against a sheriff for taking the goods of the assignees; and it was resolved, that, though the statutes of bankruptcy vest the property in the assignees, yet that relation shall not work so as to make officers who had a good authority, and took the goods lawfully, trespassers; and so is the case of *Bailey v. Bunning*. This case of *Lechmere v. Thorogood* is reported in two other books. In Comberbach, the latter part of the case is agreeable to this of Shower, that a construction should not be made to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me that he did not understand what they were arguing about; for, he makes Lord Holt say what he could never say, about barring the extent of the Crown. In 3 Modern, it is as plain that the reporter misunderstood what passed; for, he says, the extent came too late, and that the property was bound by the fi. fa., though the contrary is very clear. Then, as to the case of *Cole v. Davies*, Lord Raymond was very young when he took his note of it, which is very short. It was an action against the assignees; but there is no state of the case, nor of any one fact in it; but this much appears, that it is not applicable to the present case, as it is an action against the assignees. From the fourth resolution in that case, it seems that there must have been a sale by the sheriff, before the act of bankruptcy committed, to a person who suffered the goods to remain in the bankrupt's possession;

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and that the assignees had seized the goods, looking upon the sale as fraudulent. It is there said to be resolved, that if A.'s goods are seized on a fi. fa., and sold to B., though B. permits A. to keep possession, &c., it will not make the execution fraudulent, nor will a subsequent act of bankruptcy defeat it. I should have doubted on the very point there resolved; but, be that as it may, it is no way applicable; and all the rest are only obiter opinions, referring to something as known law before, and not necessary to the determination of that case. These are all the authorities cited; and they are clearly answered by stating with precision the grounds they went on. Another topic was insisted upon, that it would be extremely inconvenient if the sheriff was not allowed to sell after assignment goods taken before; for, to part with the goods again, and return nulla bona, he must take upon him to prove the change of property. Arguments ab inconvenienti are to be attended to. Let us consider, therefore, how this case stands in this respect. The sheriff by law is obliged, at his peril, to know the property of all other persons, and yet has not the same means of coming at that knowledge as in the present case. Besides, if there were any doubt about the time of the act of bankruptcy, or of the assignment, &c., I will not say how far the Court would indulge the officer to make his return, or oblige the plaintiff to take the question on him; but he might take an indemnity, or petition under the commission, or file a bill of interpleader, which would not cost him a penny. This relation is certainly often very hard on third persons; but a case can rarely happen where it will be so to a sheriff. The legislature, however, have established it, not thinking that it may not be hard on particulars, but to prevent that inundation of fraud which would otherwise be the case if bankrupts were at liberty to play their goods into the hands of other persons, by giving judgments, or the like. The sheriff ought to look to it, and might fairly have in-

sisted on an indemnity. To establish the doctrine contended for on behalf of the defendants, would be driving assignees to an application to Courts of equity to prevent collusion between bankrupts and sheriffs."

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This note of Lord Kenyon reports the judgment of Lord Mansfield with great perspicuity. It is justly observed that the facts in *Cooper v. Chitty* differ materially from the facts in this case. In *Cooper v. Chitty* the bankruptcy had happened, and was known at the time of the conversion by the sheriff. I admit that, on that account, the judgment is not to be relied on absolutely as an authority in this case; particularly as Lord Mansfield (as appears from other parts of the report) fortified his judgment by the peculiar facts of that case. Yet the principle of law which he laid down goes the whole length of the principle necessary to be established in this case to warrant a judgment for the plaintiff, and the reasoning which he employed well sustained it. And I cannot but think that that reasoning made its due impression upon the profession; for, it cannot be doubted, that, soon after that period, the prevailing opinion of the profession was, that the sheriff would be liable to an action of trover at the suit of the assignees, provided the conversion was over-reached by the act of bankruptcy. In the case of *Lazarus v. Waithman* (a), Mr. Justice Burrough says the point was settled long before he knew Westminster Hall. Mr. Justice Burrough was called to the bar in 1773, only seventeen years after the case of *Cooper v. Chitty* was decided. This observation of Mr. Justice Burrough is illustrated by by the case of *Kitchen v. Campbell* (b), which occurred in the year 1772. Although the principal question was, whether the assignees could sustain an action for money had and received after having failed in an action of trover,

(a) 5 J. B. Moore, 313.

Hitchin v. Campbell, 2 Sir W.

(b) 3 Wilz. 304; S. C. nom. Blac. 779, 827.

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yet the opportunity was taken for promulgating the law upon this very point. In the report in Blackstone, Lord Chief Justice De Grey is stated to have said, in giving the judgment of the Court—"The legal effect of an act of bankruptcy committed by a trader, is, to put it in the power of the commissioners, by relation, to divest the property from that time, in case a commission be afterwards issued; this relation takes place in every instance but three, excepted by statutes 1 James 1, 21 James 1, and 19 Geo. 2. Executions are not among these excepted cases, but are expressly declared void by the statute 21 James 1; the commission being in the nature of an execution for the whole body of creditors. By the old acts of Hen. 8 and Eliz., the commissioners had a power of acting themselves in recovering the bankrupt's effects; afterwards it became the practice to assign, which is allowed by 1 James 1, c. 15. It was not till the 5th of Anne that assignees were directed to be chosen, which was revived by 5 Geo. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued; so ruled in *Lechmere v. Thorogood*, in Comberbach and Shower, and in *Cooper v. Chitty*. But, by selling, the sheriff converts the goods, and trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action." This case in which the law as laid down in *Cooper v. Chitty* was thus distinctly recognized and again pronounced, standing, as it has done till lately, unquestioned, affords the strongest evidence, that, in the opinion of all the Judges who have sat in Westminster Hall since that time, the question was settled. Every case that has occurred, till we come to the case of *Balme v. Hutton*, has been in conformity with this judgment. Very many cases have occurred at Nisi Prius in which this doctrine has been held and acted upon, and no motions made for new

trials on the ground of misdirection; because this has been the general opinion of the profession. In the case of *Lazarus v. Waithman*, the attention of the Court of Common Pleas was called to the point; and, although the earlier cases were not distinctly brought under their consideration, yet the experience of every one of the Judges must have supplied them with cases in abundance; and I see no reason to conclude that those earlier cases would have affected their judgment. Against all this we have nothing but the plea of hardship. It is undoubtedly true that it is a hardship upon the sheriff that he should be liable to an action of any kind, when he has acted in ignorance and bona fide. But it is part of the infirmity of human legislators that the general rule which they prescribe will work hardship in particular cases; and it is for the legislature to afford such relaxation of the rule as can be done with safety. This has been done from time to time with regard to this rule of relation; but the legislature has not relaxed it so far as to give relief to the sheriff in this case. The sheriff is exposed to other risks where he acts equally bona fide. The office is an office of risk and liability; but it is not an office of unmixed risk and liability; the sheriff receives remuneration for his risk as well as his trouble, and he cannot take the remuneration and shake off the liability. If he thinks that the risk is disproportionate to the remuneration, let him apply to the legislature for relief; his risks have been materially lessened by the legislature; his profits have not been abridged. There is not any case of hardship upon the sheriff under the bankrupt law, which can be compared with the case of *Glassepoole v. Young* (a). That was an action of trover against the sheriff. The plaintiff, then a widow, had intermarried with one Mearing. The goods in question at the time of her marriage were her property. In the

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(a) 9 Barn. & Cress. 696; 4 Man. & Ryl. 533.

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course of the next year a judgment on a warrant of attorney was entered up against Mearing, and a writ of fi. fa. issued, under which the sheriff seized the goods in the house where Mearing and the plaintiff lived together as man and wife. The plaintiff believed herself to be his wife; an application was made to set aside the execution for some supposed irregularity, in which she made an affidavit as his wife. Two years afterwards she discovered that he had a former wife living. She brought an action of trover against the sheriff, and recovered the value of the goods which he had taken. There was in that case every ingredient that could constitute a case of bona fides in the sheriff, and of hardship in his being thus called upon long afterwards to pay the value of the goods which he had seized and sold: but the law was inflexible. Under a warrant to take the goods of Mearing, the sheriff had taken the goods of Glasspoole: and the Court of King's Bench held that he was liable. I do not know that the hardship upon an officer who is well paid for his risk, is greater than that of many other persons upon whom the operation of the bankrupt laws is found to press, and upon whom they formerly pressed still more heavily. The preambles to the early statutes shew the unceasing jealousy of the legislature as to the frauds of bankrupts; and one after the other recites the difficulty of keeping pace with the secret frauds and contrivances which were resorted to to defeat the creditors. Possibly it was owing to that that the relation back of the title of the assignees was long allowed to prevail to an extent which worked great injustice. Nevertheless, the Courts of law contented themselves with expounding the law as they found it; and the repeated amendments which the law has received, it has received from the legislature. The statutes of 1 Jac. 1, c. 15, 21 Jac. 1, c. 19, 19 Geo. 2, c. 32, 46 Geo. 3, c. 65, have all been passed to relieve persons from the hardship occasioned by the application

of this principle—the relation back of the property of the assignees. And during the pending of this cause, the Interpleader Act has extended the protection which before was given to the sheriff. Upon the whole, I am of opinion that the judgment of the Court of Common Pleas is right, and ought to be affirmed.

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Mr. Justice TAUNTON.—I concur in the judgment which has just been delivered by my Brother Gurney. I do not think it necessary to state the reasons which lead me to this conclusion, because I gave this question my deliberate consideration, and stated my reasons at length for the opinion which I had formed, in the case of *Balme v. Hutton*. I see no reason to depart from the conclusion to which I then arrived, notwithstanding the very learned and elaborate judgment of the Court of Exchequer. I dread the consequences of a contrary decision. I think that the uniform practice of one hundred and fifty years ought not to be disturbed by fancied innovations on the one hand, or on the authority of three or four obsolete cases on the other. I am therefore of opinion that the judgment of the Court below ought to be affirmed.

Mr. Baron BOLLAND.—The learned Judges who formed the Court of Common Pleas when this special verdict was before it, being satisfied that there had been a sufficient conversion to raise the question of the defendant's liability, and that Court having recently decided, in the case of *Price v. Helyar* (a), that a sheriff who had taken in execution the goods of a bankrupt, as the defendant in the present case has done, was liable in trover to his assignees, although such sheriff had no notice of the bankruptcy, and a commission had not been sued out at the time of the execution, delivered judgment in favour of

(a) 4 Bing. 597; S. C. 1 Moore & P. 541.

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the plaintiff, leaving the defendant to resort to a Court of appeal, if he should be desirous of having the question of law again discussed. The chief point now submitted to us having been so lately decided in the Court of which I am a member, in the case of *Balme v. Hutton*, after most anxious consideration of all the cases that are to be found in the books respecting it, and agreeing, as I still do, with all that was said by the learned Lord Chief Baron in the elaborate judgment delivered by him as the unanimous opinion of the Court, I might, as far as relates to the main question, content myself with referring generally to that decision, and shortly pointing out some of the authorities that led me to the conclusion that I arrived at; but, as that judgment of the Court of Exchequer has been since reversed, and I cannot but be aware that a great difference of opinion exists in the minds of the Judges, I shall state more fully than I should otherwise have done, my reasons for still adhering to the opinion I have before delivered on the question.

There are two points arising upon this special verdict—first, whether the defendant below is liable—secondly, if he is liable, to what extent.

The claim of the plaintiff below is founded upon a statutory provision, by which the property of a bankrupt at the time of his bankruptcy is subjected to the operation of a commission against him. The late statute 6 Geo. 4, c. 16, by which the law of bankruptcy is now regulated, though it differs in some parts from former acts, furnishes no grounds for a difference of construction in this particular. The cases, therefore, which have arisen upon former statutes are still to be considered as authorities upon the point before us. The defendant in the action was a ministerial officer; he was acting in the execution of his duty as sheriff, and in obedience to a command from one of the superior Courts of justice. The proceeding was not for his benefit; it was in the King's name. The property

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at the time of the seizure was in the bankrupt, and the defendant had no notice of the bankruptcy. Looking at this state of things, it does appear to me a very strong measure to make that public officer a wrong-doer, in consequence of subsequent events over which he had no control. But it is said this hardship upon the sheriff cannot operate in his favour; and instances are adduced in which the law holds him answerable for acts performed in the course of his duty, and in which he has been equally innocent and honest as in the present case. I admit that many and very serious liabilities are thrown upon sheriffs; but those liabilities were known to the Courts that decided the earlier cases, and yet these cases establish a distinction between the responsibility of a sheriff and an execution creditor. I allude to *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*. The case of *Bailey v. Bunning* is the earliest, I believe, on this point. It was an action of trover against a bailiff: the jury found a special verdict. On 6th June, J. S. committed an act of bankruptcy. On 11th June, J. D. sued out a *fi. fa.* against the goods of J. S., tested 4th June, under which the defendant seized. A commission against J. S. afterwards issued, and the goods were assigned by the commissioners to the plaintiff; if the taking by the defendant were lawful, the jury found for him; if not, for the plaintiff. It is unnecessary to state the grounds upon which it was argued at the bar. It came on first in Trinity, 17 Car. 2. Judgment was not given till Easter Term following. The case was decided in favour of the defendant, he being an officer obliged to execute the writ, who could not know of the acts of bankruptcy, or that any commission would be sued out. The case, as reported in *Siderfin*, is put on the official character of the defendant only. It is observed, in the report of *Cooper v. Chitty* (a), by Lord

(a) 1 Burr. 35.

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Mansfield that "Siderfin does not seem to know what the Court was going upon, for the Court tied it up to the taking, whereas he does not seem to distinguish between the trover and the trespass." It must be admitted, the report is imperfect in some particulars; but, as to the grounds of the judgment, Siderfin agrees with Levinz; and it is material to observe, that, in the report of *Phillips v. Thompson*, in C. B., by Levinz (a), the Judges, in noticing *Bailey v. Bunning*, stated that that case was decided solely in excuse of the bailiff, who ought to be excused for executing the writ; and not on the ground that the goods were bound by the writ: and it must not be lost sight of, in estimating the weight to be given to the reports in the third volume, that they are reports of cases determined during the time that Levinz was a Judge of the Court of Common Pleas, and of others which were decided after he was removed from the Bench. It appears, therefore, that *Bailey v. Bunning* may be relied on as an authority that, in the case of an officer, an act would be lawful, which, if done by an ordinary person, would be an unlawful taking, and subject the doer to an action of trover. *Lechmere v. Thorogood* is the next authority. It was an action of trespass by the assignee of a bankrupt against the sheriffs of London and others for seizing the goods of the bankrupt after an act of bankruptcy by him. The act of bankruptcy was committed on the 28th of April, the seizure was on the 29th. It was put by Shower, arguendo, "that, though the statute vested the property of the goods in the assignee, yet this relation shall not work a wrong to make the officer a trespasser, who had a good authority, and took goods lawfully; and so is the case of *Bailey v. Bunning*, Sid. 271, 272." The Court was clear that the verdict was against the plaintiff, entire damages being given; and that this action lay not against the officer,

though trover would against the party: and so judgment for the defendant. Here, again, the distinction between officers and other persons is recognised by the Court; and, though the action was trespass, it is clear from the report that the decision would have been the same had it been trover.

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In *Cole v. Davies* and others, assignees of Maule, a bankrupt, Lord Raymond (*a*) reports Lord Chief Justice Holt to have ruled at Nisi Prius, "that, if the goods A. be seized upon a fi. fa. issued upon a judgment obtained against A., and after the seizure A. becomes bankrupt, this act of bankruptcy cannot affect the goods levied in execution, as aforesaid; but, if A. was a bankrupt before the seizure, and, after the bankruptcy, the sheriff, upon a writ of fi. fa. to him directed, upon a judgment obtained against A., seizes the goods and sells them, and a commission of bankruptcy is granted, and the said goods assigned by the commissioners, the assignees may maintain trover against the vendee of the goods; but no action will lie against the sheriff, because he obeyed the writ." The authority of this report is impeached by Lord Mansfield, upon the ground of Lord Raymond being young at the time, and that it is a loose note of what was said obiter. With the highest respect for every opinion delivered by so great a man as Lord Mansfield, I must take the liberty of saying that the four resolutions in Lord Raymond's report, of which that I have extracted is the first, appear, as far as the reporter is concerned, to bear the stamp of accuracy; the positions laid down are plain and simple, and such as even a young man of so much talent as Lord Raymond could readily comprehend. The case of *Aldridge v. Ireland* (*b*) strongly supports these cases. The case of *Cooper v. Chitty* and others was an action of trover by the assignees of a bankrupt against the sheriffs of

(*a*) 1 Lord Raym. 724.

(*b*) 1 Taunt. 273.

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London. On the 4th November the trader committed an act of bankruptcy; on the 5th a fi. fa. issued against his goods; on the 8th a commission was sued out, and an assignment of his property was executed; on the 28th the sheriff sold the goods. Thus, the seizure was at a time when the sheriff was ignorant of the act of bankruptcy, but the sale was *ticenty days* after the commission and assignment, and when the bankruptcy was notorious. No notice could be fuller; and it seems that the judgment proceeded upon the sale having been after notice of the bankruptcy, and that the sheriff had done an act which, even in his character of a public officer, amounted to a wrongful conversion, and rendered him liable to answer to the assignees in an action of trover; but that the seizure, even after the act of bankruptcy, was, in the case of the defendant, as sheriff, excusable. The Court of Exchequer, in its judgment in *Balme v. Hutton*, after having taken the same view of the case of *Cooper v. Chitty* as I have, has at very great length pointed out many expressions used by Lord Mansfield, to shew that he never could have intended that case to have the extended operation contended for on the part of the plaintiff. Unless many observations of the learned Lord were meant to point out and to draw a distinction between the liabilities of an officer who acted in perfect ignorance, and one who proceeded to a sale after notice of a bankruptcy, he took very unnecessary trouble, and he delivered an opinion at very great length, which might have been comprised in a few sentences. In 1807, the case of *Potter v. Starkie* was tried before Mr. Baron Wood, at Lancaster. It appeared on the trial, that, on the 1st of the month, a fi. fa. was delivered to the sheriff, and on the 2nd, J. S. committed an act of bankruptcy; the sheriff seized on the 3rd. The Judge held the sheriff liable. A rule nisi for a new trial was obtained. *Cooper v. Chitty* and *Timbrell v. Mills* were quoted and relied on by the counsel, Richardson, for

the sheriff; and it was contended that the ground of the decision in those cases was, that the sale was after the assignment, when the sheriff must be taken to have had notice of the bankruptcy. It was argued, in favour of the plaintiff, that the sheriff had not taken the goods mentioned in the writ, i. e. the goods of J. S., but those of other persons, and that he was therefore guilty of a conversion. The rule was discharged. And Lord Chief Justice Best, in his judgment in *Price v. Helyar*, says: "We were anxious to inquire about the case of *Potter v. Starkie*; and we learn from Mr. Justice Richardson that the report of that case in the argument in *Maule & Selwyn*, is accurate; that the Court of Exchequer did decide in the manner there stated, and gave the reason there assigned, that the case depended upon the previous decision in *Cooper v. Chitty*; and we think the case of *Cooper v. Chitty* embraces the principle on which we now decide." The case of *Potter v. Starkie* was, therefore, determined upon the single authority of *Cooper v. Chitty*; *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, were not referred to either at the Bar or by the Court. No distinction was drawn between the officer, the minister of the law, and the execution creditor, by whom and for whose benefit the law is put in motion. *Wyatt v. Blades*(a) was a case tried before Lord Ellenborough. It was trover for taking the bankrupt's goods in execution after a secret act of bankruptcy. The act of bankruptcy was on the 8th December. The sheriff seized under a fi. fa. on the 8th February, and removed the goods; a commission issued on the 12th, and notice not to sell was served on the sheriff. The sheriff did not sell; no point was raised but upon the conversion; and Lord Ellenborough held that the removal of the goods was sufficient to make the officer liable. It must, however, be observed that the cases that

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had made a distinction between the liability of the sheriff and that of other persons, were not at all brought under the consideration of his Lordship. The cases of *Lazarus v. Waithman* in which the sale was before the assignment, *Price v. Helyar* where the sheriff had not only levied, but paid the money to the execution creditors more than six weeks before any commission issued, and *Dillon v. Langley* (a), are certainly authorities to support the decision in *Potter v. Starkie*; but in them, as in *Potter v. Starkie*, the earlier cases of *Bailey v. Bunning*, *Lechmere v. Thorogood*, *Cole v. Davies*, and *Aldridge v. Ireland*, were never mentioned; since no distinction was presented to the Court in either of them between the sheriff and the execution creditors. But, as the determinations in all of them appear to me to have proceeded upon an erroneous view that was taken of the case of *Cooper v. Chitty*, I cannot allow them to have that weight which a deliberate consideration of the cases that preceded *Cooper v. Chitty* would have given them. If, therefore, no facts had been found by this special verdict to take it out of the rule that guided the Courts in their decisions of the three cases that preceded *Cooper v. Chitty*, in respect of the liability of a sheriff, as being the mere minister of the law—and as I am irresistibly led, by many of the observations in the judgment of Lord Mansfield in *Cooper v. Chitty*, to believe that the same rule was recognized by him in deciding that case, and that he never meant to extend the liability of a sheriff to the alarming length to which the later cases have carried it—I should have felt myself called upon to give my judgment for the defendant below. That judgment I am, however, upon this special verdict, prevented from pronouncing. It appears that a part of the goods seized, to the value of 5*l.*, was packed up by the order of John Williams, an agent of the defen-

(a) 2 Barn. & Adolph. 131.

dant in the action, and sent to Bridport, to William Restarick, to be deposited and kept by him till 5*l.*, a part of the sheriff's poundage, and the expenses of Restarick for inventory, holding possession, levying, and other expenses, were paid; and that such goods were held by Restarick for about two months, when, upon payment of the 5*l.*, they were forwarded to London, to Joshua Payne, the execution creditor. This, I am of opinion, is a sufficient conversion by the sheriff, the defendant in the action, to entitle the plaintiff below to have a verdict entered for him for 5*l.*, the value of such goods.

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Mr. Justice JAMES PARKE.—The principal question in this case is, whether an action of trover will lie at the suit of the assignees of a bankrupt against the sheriff for the conversion of goods seized under a *fi. fa.*, such conversion having taken place in the due course of levying under that writ, after the act of bankruptcy, but before notice of it, and before the issuing of the commission. Another question has been raised as to some goods of the value of 5*l.*, which may be considered as not having been seized under the writ, and as having been converted after the issuing of the commission; but, as I am of opinion that a conversion by seizing and disposing of the goods seized in due course under an execution after an act of bankruptcy, and before the commission or notice of an act of bankruptcy, renders the sheriff liable in this form of action, it is unnecessary to draw any distinction between the two portions of goods which are the subject of this special verdict; and I am clearly of opinion that the plaintiff in error is liable for both. The present case is precisely similar, as to the principal question, to that of *Balme v. Hutton*, recently so much discussed and considered in the Courts of Exchequer and Exchequer Chamber; in which all the authorities were reviewed, and the decision of the former Court was reversed by the all but unanimous opinion of

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the latter; and by the Court of error this action was held to be maintainable. I must own that it appears to me, that, even if a different opinion might have been maintained before that case, we must conform to that decision if we are to treat the present case in the same way that others have hitherto been treated. In our system of judicature, we are bound by precedent and the authority of previous cases, unless they are plainly and manifestly founded upon erroneous principles; and that for the wise purpose of securing a reasonable degree of certainty in our judicial proceedings. We have here a direct authority, in addition to a great number which existed before, upon the very question; a solemn judgment of a Court of error, which has reversed that of the Court below, and, whatever respect we may feel for the Judges of that Court, has thereby, for the present at least, deprived that judgment of its authority as a guide in similar cases. We are not in the situation of being obliged to weigh the conflicting decisions of two different yet equal Courts against each other, and of contrasting the arguments in favour of each; but we are bound to consider the judgment of one Court as annulled by the superior authority of the Court of error, and to treat it as being wrong in point of law, until the highest tribunal in the country shall have pronounced a different opinion, or unless the judgment of reversal should appear, beyond all reasonable doubt, to have proceeded on wrong principles—which it is quite impossible to predicate in the present instance. If we do not adopt this course, no decision except that of the House of Lords can be safely relied upon as an authority by practitioners in advising their clients, or Judges in pronouncing an opinion upon questions of law. Upon this ground, though I had entertained never so strong an opinion in favour of the decision of the Court of Exchequer, I should have felt bound to defer to the judgment of a superior Court, and to act in conformity to it in *other cases*; but, if called

upon to advise the House of Lords on a writ of error, I should have undoubtedly considered myself at liberty to express the opinion which I entertained, without giving the same weight to the particular judgment under review. But, supposing that no such decisions as those in *Balme v. Hutton* had taken place, or that each is to be deemed of equal weight, so that we are to decide this case without being bound by either, it seems to me to be quite clear, that, independently of that case, the weight of authority is so strongly in favour of one side, that, unless we are prepared to relinquish the principle on which Judges have always hitherto acted, we are bound and concluded by it; for, I am quite satisfied that it cannot be fairly said that the cases are founded upon principles which are clearly and manifestly wrong. I am quite at a loss to know when a question is to be deemed to have been decided and finally settled, if this is not. The cases of *Potter v. Starkie* (a), *Lazarus v. Waithman*, *Price v. Heyar*, and *Dillon v. Langley*, are all decisions in banc upon this point. The opinion of Lord Chief Justice De Grey in *Hitchin v. Campbell* is to the same effect, though that was not the question in judgment. On the case of *Wyatt v. Blades*, I place no reliance, as it was only at Nisi Prius: but it shews that it was taken for granted by Lord Ellenborough and the bar. The same point has been so laid down in different text books (b): and I may say for myself, that, since I became a member of the profession, and in the habit of advising others, I have considered that no question of bankrupt law was more completely settled than this; I never heard that any doubt was entertained upon it; and I certainly felt some surprise when the objection was taken on the first motion for a new trial in the case of *Balme v. Hutton*. To countervail so many modern

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(a) 4 Mau. & Selw. 260.

(b) Cooke's Bankrupt Law. Bac. Abr. Gwill. ed. 1798.

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authorities, and the established modern practice, what arguments and what authorities are adduced on the other side? It is said, first, that these cases have proceeded upon a notion that the question was decided in *Cooper v. Chitty*; whereas the only point there decided was, that the sheriff was liable in trover, where he seized after a secret act of bankruptcy, and sold after the assignment. In answer to this I say that the Judges in all these modern cases have not been under a misapprehension as to the effect of the case of *Cooper v. Chitty*; it was not treated as a case *in point*, but as shewing generally that the property in goods was vested, by relation to the act of bankruptcy, in the assignees, where the execution was not executed before it; and that mere property is a sufficient title in an action of trover; though not in an action of trespass, in which, by the rule of common law, possession is necessary at the time of the trespass committed. This principle I consider as having been laid down by Lord Mansfield in that case, when he speaks of making persons *trespassers* to the assignees. That word is marked in italic in Lord Kenyon's report (a), and it is explained by the context to mean, not *wrong-doers* generally, but *trespassers* in the technical sense, and subject to an indictment or action of *trespass*: and it is perfectly clear that the Court of King's Bench, in the case of *Smith v. Milles*, considered Lord Mansfield as having laid down and acted upon this distinction between the two forms of action; and Lord Chief Justice De Grey, in *Hitchin v. Campbell*, expressly states that this distinction prevails. He says, "that, notwithstanding the transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy and before the commission issued: but, by selling, the sheriff converts the goods, and then trover is maintainable

(a) 1 Lord Kenyon, 418.

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against the sheriff or his vendee." It is next urged that the authority of these numerous modern cases is at variance with two ancient decisions—*Cole v. Davies* and *Bailey v. Bunning*—which, it is said, have not been adverted to in the modern cases. The first of these is a short note of Lord Raymond of a Nisi Prius decision of Lord Holt. The facts are not stated; and Lord Mansfield, in *Cooper v. Chitty*, treats it as of no weight. From the different reports of the latter case, it is difficult to discover the precise ground of the decision: but it seems, I think, to have been decided for the defendant upon the peculiar form of the conclusion of the special verdict; which, after stating the time of the teste of the writ, act of bankruptcy, taking, and commission and assignment, refers to the Court this question only, whether the goods were well taken or not: and it is to be observed that no other conversion than the original taking was found in that case; for, the goods remained in the hands of the defendant at the time of the commencement of the suit (*a*); and the demand and refusal, it is well known, do not constitute a conversion, but are only evidence of it. The Court may have proceeded on the ground that the taking was not *at the time* unlawful, being made by an officer who had then a right to take; and was not a mere unauthorized seizure; that it was not even by relation a *trespass*; and that a taking which was not a *trespass* could not, of itself, without more, be a conversion. At any rate, this case is not to be put in competition, in point of authority, with the numerous subsequent cases and the long-established practice on this subject. Of the case of *Lechmere v. Thorogood*, which has also been noticed as an authority at variance with the modern cases, it is enough to say that it was an action of *trespass*; and the case of *Bailey v. Bunning* there cited is only cited to prove that the taking

(a) See the special verdict, ante, Vol. 3, p. 6, n.

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is not a *trespass*. So stands the question upon authority; and the balance is undoubtedly in favour of the modern decisions and the long-established practice: and, if we are to follow the ordinary principles of decision, assuredly we are bound by them; but, if we are to disregard them upon this occasion, then we must disregard both alike: we must not treat the case of *Bailey v. Bunning* as binding upon our judgment, and all the others as of no avail. Let us see, then, how the question stands independently of all authority. It lies in the narrowest compass, and is a question of construction only of the positive enactments of the statute law, by which the commissioners were empowered to transfer the bankrupt's property, originally to particular creditors, afterwards to general assignees. Is the effect of that assignment to transfer the property at the date of the act of bankruptcy, as to the sheriff and other ministerial officers of the same character, or is it not? This is the whole question. If it is, the sheriff must be liable; if not, he is excused. The common law doctrines on the subject of relations (*a*), "that no relation shall make that tortious which was lawful," and "that relations are fictions of law, which shall never do wrong," have, in my judgment, no legitimate bearing upon the point to be decided; and, if they had, the argument arising from them would go the length of protecting creditors also, and all others who acquired a property in the goods of the bankrupt by an act lawful at the time. But this relation is not a *fiction of law* created by the common law for the purposes of doing justice; it is created by the express provisions of an act of parliament: and the only question is, whether it is a *qualified* relation or not. If the sheriff is not affected by the statutes, it must be because their provisions creating the relation do not comprise that officer; or because, if they do, he is by some

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other clause expressly, or, by the purview of the statutes, impliedly, exempted from their operation. First, let us examine the clauses of the bankrupt statutes, and see whether they extend to such an officer or not. The first statute, 34 & 35 Hen. 8, c. 4, gives a power of sale of the bankrupt's lands, tenements, goods, &c., which is to be good and effectual in the law to all intents, constructions, and purposes, as though it had been made by the bankrupt by writing indented, inrolled, &c.: but this statute appears to me to give no retrospective operation to the assignment. The important statute is the 13 Eliz. c. 7, which, after enumerating what are to constitute acts of bankruptcy, empowers the Lord Chancellor to grant a commission, and the commissioners to take by their discretion such order and direction, as well with the body of the offender, as also with all his lands, tenements, and hereditaments which he shall have in his own right before he become bankrupt; and also with all such lands as such person shall have purchased jointly with his wife, children, or child, to the only use of such offender, or of or for such use, right, or title as such offender then shall have in the same which he may lawfully depart withal, or with any person of trust to any secret use of such offender; and also with his money, goods, chattels, wares, merchandizes, and debts; and, by deed indented, inrolled in one of the Queen's Courts of record, to make sale of the lands belonging to the bankrupt, freehold and copyhold; and also of all fees, &c., goods and chattels; or otherwise to order the same for the true satisfaction and payment of the creditors, rate and rate alike, according to the quantity of their debts: and the section then proceeds to enact that every direction, order, bargain, sale, &c., shall be good and effectual in the law to all intents, constructions, and purposes, against the said offender or debtor, his wife, heir or heirs, child or children, and such persons as by such joint purchase with the offender shall have any estate

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or interest in the premises, *and against all other person or persons claiming by, from, or under such offender or debtor by any act or acts had, made, or done after any such person shall become bankrupt as is aforesaid*; and also against the lords of manors whereof such copyhold lands were holden, their heirs, successors, and assigns. The 21 Jac. 1, c. 19, s. 9, "for the better distribution of the lands, &c., goods, and chattels of the bankrupt to and amongst his creditors," enacts (*inter alia*) "that all and every creditor having security for his debts, by judgment, statute, recognizance, specialty, or having made attachments in London, &c., of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands, &c., and goods of such bankrupt, before such time as he shall or do become bankrupt, shall not be relieved upon any such judgment, &c., for more than a rateable part of their just and due debts with the other creditors of the bankrupt, without respect to any penalty or greater sum contained in any such judgment, &c." The 4 Anne, c. 4, s. 8, first mentions "the assignees of the commissioners;" and the 6 Anne, c. 22, s. 4, first directs a meeting to be held by the creditors for the choice of assignees. Until the time of passing *one* of these statutes, the effects of the bankrupt were assigned to different creditors, and not to general assignees for the benefit of all. It is unnecessary to notice the subsequent acts of parliament further than to say that the 5 Geo. 2 re-enacts, alters, and adds to the provisions of former statutes, some of which had expired; and that this and the following statutes were repealed by the bankrupt law at present in force, the 6 Geo. 4, c. 16. This last act of parliament, by the sixty-third section, directs the commissioners to assign the bankrupt's estate and effects to the assignees: but it has no words expressly avoiding mesne acts, or giving a relation to the act of bankruptcy. The clause

has been taken from the 1 Jac. 1, c. 15, s. 30, and 5 Geo. 2, c. 30, s. 26, without considering that those statutes were to be construed in conjunction with the 13 Eliz. c. 7, which gives the retrospective effect to the assignment: but by the new act that statute is repealed. Notwithstanding this oversight, however, I apprehend that the assignment under the new statute must be held to have a similar operation to that under the old: and indeed it has never been contended otherwise, either during the present argument or on any other occasion. The question therefore seems to me to turn upon the construction of the 13 Eliz. c. 7, and 21 Jac. 1, c. 15; which former statute is, by the express provision of the latter, to be "in all things largely and beneficially construed and expounded for the aid, help, and relief of the creditors." It is contended on the part of the sheriff, that he is not affected by the retrospective clause, because *he does not claim by, from, or under such offender*, by any acts had, made, or done after he became bankrupt. But it appears to me that the sheriff, who, by virtue of the judgment and execution against him, has a right to take only such interest as the bankrupt has, does claim by or under him; not, indeed, by a voluntary act or conveyance of the bankrupt, but still by *an act done* after the bankruptcy; for, the teste or the issuing of the writ, which, as the law then stood, would, if this statute had not passed, have given to the sheriff a right to seize goods, as against subsequent purchasers, was undoubtedly *an act done*. The clause, it is to be observed, says nothing as to the act being voluntary, or being the act of the bankrupt himself. Let us suppose that a lease was made by the owner of a chattel, and a covenant for quiet enjoyment in that lease against all claiming by, from, or under the lessor, by any act or acts had, made, or done; and the sheriff seized and sold the chattel under an execution against the lessor tested and delivered to the sheriff before the lease; would not

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this be a breach of the covenant? And, besides, if the sheriff does not claim by or under the debtor, the execution creditor certainly does not, and the assignment would not be good against him; which is a point that has never for a moment been contended. Further, if the sheriff be not a "person claiming under the bankrupt," it must be wholly immaterial whether or not he have *notice* of the act of bankruptcy, or even of the commission; he cannot possibly be a person so claiming, *because* he has notice of either or both those facts, if he is not without; and therefore, if the construction contended for by the plaintiff in error is put on the words of the statute, it follows that the sheriff would not be liable if he seize the goods of the bankrupt with full knowledge both of the bankruptcy and commission; a proposition which is not attempted to be asserted, for, on the contrary, it is distinctly admitted that he must be liable in such a case. It seems to me, therefore, that the sheriff, if he had seized and sold under a writ tested and issued after an act of bankruptcy, would not have been protected upon the proper construction of this statute. The 21 Jac. I prevents a creditor from having any lien on the land of the bankrupt by a judgment obtained, or on his goods by fieri facias tested or issued, before the bankruptcy: it prohibits the commissioners from assigning to such person more than a rateable part, in the same way as to the other creditors—that is, the lands notwithstanding such judgment, the goods notwithstanding such writ of fieri facias, were to be assigned proportionably to each creditor, like the bankrupt's other goods; and, consequently, since that statute, the sheriff could not have seized after an act of bankruptcy any goods of the bankrupt under a writ tested or issued before the act of bankruptcy. Since the statute of 6 Anne, if not since the 4 Anne, the commissioners have had the same power of assigning to the general assignees that they had before of assigning to individual creditors: and the sheriff has no

power to seize any of the effects so assigned, after the act of bankruptcy, under a writ, whenever tested, issued, or delivered to him. The provisions, therefore, of the statute of 13 Eliz. c. 7, in my judgment, affect the sheriff as well as all other persons claiming title to the goods of the bankrupt, either by contract with or assignment from him, or by operation of law: and the same relation which is given by the first statute is no doubt continued by all those which follow and by the existing law.—This brings me to the second question—whether the case of the sheriff is in any way *excepted* from the operation of the statutes which give this relation. It is certainly nowhere *expressly* excepted: if the exception exist, it must be *implied*. Now, I take it to be clearly the duty of Courts to *construe* acts of parliament only; and that duty is to be performed by construing them according to the legal, ordinary, and grammatical sense of the words used; unless such construction would be inconsistent with the purpose of the legislature express or implied, or lead to some manifestly unreasonable or absurd consequence; in which cases the language may be qualified so as to obviate the inconsistency or mischief, but no further. The question is always what is the meaning of that which the framer of the act has done, not what he ought to have done. It cannot be said that the construction which makes the sheriff liable is inconsistent with the avowed purpose of the legislature—the even distribution of all the bankrupt's effects; on the contrary, it is clearly in furtherance of it, by extending the remedy for the recovery of the bankrupt's goods. The only ground upon which an implication can be rested in this case is, that such a construction would be unreasonable, on account of the hardship on the sheriff. But a mere hardship on particular individuals is not unreasonable when it is for the purpose of completely securing an object beneficial to a great class: and, if the mere hardship on some would be a legitimate ground of introducing implied

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exceptions, why should we stop with the sheriff? The case of persons deriving title from the bankrupt by purchase and payment of the purchase money, by taking a pledge of the bankrupt's goods, by paying their debts to the bankrupt, by receiving their debts from him—in ignorance of the bankruptcy—are all cases of hardship, not perhaps quite so great as that of the sheriff, but certainly so nearly approaching to it in degree that it is impossible to draw a line between them, and say that the Court shall imply so far on account of the hardship, and no further. The only distinction in the case of the sheriff is, that he is not a volunteer: he is bound to execute the process of the Court, and liable to an action at the suit of the creditor for not executing it, even though he knows of the act of bankruptcy (*a*); in which action the damage *may* equal the amount of the debt. With respect to the extreme difficulty of acquiring knowledge of the act of bankruptcy, and the physical impossibility of knowing whether a commission will afterwards be issued or not, he is precisely in the same situation with all other persons who intermeddle with the bankrupt's property. It is, however, admitted in the argument on the other side, that it is not this peculiarity in the sheriff's case that is the ground of exception; for, it is allowed, that, if he knows of *the act of bankruptcy*, he is not to be exempted; and yet he is just as much under an obligation to execute the process, and liable to an action if he does not, with or without that knowledge, unless not only a commission has issued, but unless it has been acted upon and an assignment made; and therefore it follows, either that this distinction between his liability with notice of the bankruptcy and without must be abandoned, and the sheriff exempted in both cases; or that there is just as much reason to exempt all

(*a*, That is, provided such act of bankruptcy be not followed by a commission.

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other innocent persons as the sheriff; for, all *may* by diligent inquiry equally well ascertain whether there has been an act of bankruptcy or not. In truth, this doctrine of exceptions by implication from the statute on the ground of hardship, is an usurpation upon the province of the legislature. Their object, by giving a retrospective operation to the assignment, was, to secure the equal distribution of the bankrupt's effects; and, for that purpose, it was deemed more beneficial to provide that the assignment should by relation defeat all mesne acts, at the expense of hardship in individual cases, than, by giving it only a present operation, to allow an opportunity to those fraudulent and improvident dispositions to which men in a state of bankruptcy almost invariably have recourse. Where the operation of this general rule has, in the experience of the legislature, produced peculiar hardship, they, and not the Courts of law, have in various subsequent statutes mitigated its severity: and if, by continued experience, the case of the sheriff shall appear deserving of it, we must trust to the wisdom of the legislature to make an exception; and not, by making one ourselves, violate the principle upon which judicial decisions ought to be made. Upon the ground of authority, therefore, and, independently of authority, upon the fair construction of the statute law, I think the sheriff is liable to this action, and that the judgment of the Court below ought to be affirmed.

Mr. Baron VAUGHAN.—After the elaborate discussion of this question in the case of *Balme v. Hutton*, first in the Court of Exchequer, and afterwards upon a writ of error in the Exchequer Chamber, I enter with unfeigned reluctance upon an examination of the arguments used and the authorities referred to upon those occasions. But, concurring as I did in the judgment delivered by Lord Lyndhurst in the Court of Exchequer, from which a majority of the Judges of the Court of error have since differed, I feel

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it my duty to state the reasons which upon repeated reflection have served only to confirm my original impression. The main question raised by this special verdict, and involving an important principle of law, is, whether a sheriff, having seized the effects of a trader, and sold them, under a fieri facias issued after a secret act of bankruptcy, of which he had no knowledge, is liable for the value of the property so sold in an action of trover at the suit of the assignees appointed under a commission subsequently issued; I admit the general proposition, that, after an assignment by the commissioners, all the property of the bankrupt must be considered from the moment of the act of bankruptcy as being by relation the property of the assignees; and that persons possessing themselves of such property, and dealing with or disposing of it to others, are liable to be sued for the amount in an action of trover. But, when I admit such to be the general rule prevailing in the administration of the bankrupt law, I conceive an exception to be established or necessarily implied in favour of the sheriff, a public officer, compelled to execute the King's writ, and to sell under the process of the law. The liability of the sheriff must be founded either, first, upon the nature of his office, and upon the obligations and duties incident to it; or, secondly, upon some legislative enactments; or, thirdly, upon the authority of decided cases.

And, first, as to the obligation and duty of the sheriff.—The sheriff acts as a ministerial officer in execution of the command he receives in the King's name from a Court of justice, and which command he is bound to obey. He is not a volunteer acting from his own free will or for his own benefit, but imperatively commanded to execute the King's writ. He is the servant of the law and the agent of an overruling necessity; and, if the service of the law be a reasonable service, he is justly entitled to expect indemnity so long as he acts with diligence, caution,

and pure good faith—*Necessitas quicquid coegerit defendit.* And, it should be remembered, he is not at liberty to accept or reject the office at his pleasure, but must serve if commanded by the Crown. All these considerations entitle him to protection, and in my humble judgment ought to exempt him from the character and consequences of a wrong-doer, where neither guilt nor laches can be imputed to him. Whether he has any such exemption is the point to be ascertained. As to any legislative enactments, the statutes more immediately relating to this subject are the 34 & 35 Henry 8, c. 4, 13 Eliz. c. 7, 21 Jac. 1, c. 19, 5 Geo. 2, c. 2, and 6 Geo. 4, c. 16. These several acts relating to bankrupts are general, and do not in express words create any liability in the sheriff, or establish any exception in his favour. It does not appear to me that any inference can be drawn unfavorable to the sheriff from the first statute upon the subject, viz. 34 & 35 Henry 8, which directs that every thing done by the Lord Chancellor and other great officers of state to whom authority was given to dispose of the property of persons therein described, should be “good and effectual to all intents and purposes against the offenders, as though the same had been made by the said offender or offenders *at his or their own free will and liberty;*” thereby giving to the commissioners the same authority to deal with and dispose of the property of the bankrupt as the bankrupt himself possessed prior to his bankruptcy. I am not aware that in any of the statutes relating to bankrupts (certainly not in the earlier ones) the name of the sheriff is expressly mentioned, neither do I conceive that the second section of the statute 13 Eliz. c. 7, upon which much stress was laid, can be construed to extend to him. That section, in describing the persons against whom the acts or orders of the commissioners are declared to be good and effectual in the law to all intents, constructions, and purposes, are those expressions “against the *offender or offenders* (for the bank-

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rupt was then regarded as a criminal), debtor or debtors, and against all other person or persons claiming *by, from, or under* such offender or offenders, debtor or debtors, by any *act or acts* had, made, or done after any such person shall become bankrupt." It is not that the act or assignment of the commissioners shall be effectual against all persons claiming *by, from, or under* the bankrupt; but this qualification is introduced, claiming by, from, or under him *by virtue of any act* had, made, or done after he shall become bankrupt: and, although the legislature has not superadded to the phrase "*by virtue of any act had, made, or done*," the words "*by him*," yet I think such to be their reasonable construction. Can, then, the sheriff seizing the property of a bankrupt under a *fi. fa.* issued after a secret act of bankruptcy (of which it is admitted he could have no knowledge) be said to claim *by, from, or under the bankrupt* by force of any act done *after* his bankruptcy? The execution cannot be considered as emanating from the act of the bankrupt. It is the fruit of a judgment obtained against him in *invitum*, "*not moving from him of his own free will and pleasure*," to use the expression contained in the first section of the statute 34 & 35 Henry 8; but *involuntary* as regards the bankrupt, and by *compulsion*. I conceive that the legislature intended to disable the bankrupt from doing any act to control or dispose of his property after an act of bankruptcy committed by him, and from that moment to regard him as *civiliter mortuum*; and the assignees, when appointed under a commission thereafter to be issued, *as executors* invested by the legislature with the complete control over his property. The sheriff, therefore, not being *expressly* named, the words referred to do not, I conceive, in their natural interpretation extend to him. And I have heard no argument founded in reason, justice, or the policy of the bankrupt laws, to call for a construction which must involve an innocent public officer in consequences which should attach only upon

criminal neglect. Upon the argument of this case the attention of counsel was directed to the 9th section of the 21 Jac. 1, c. 19, which, after giving power to the commissioners to examine parties for the discovery of the debts due and owing to the creditors seeking relief under the commission, enacts; that every creditor having security for his debt by judgment, statute, recognizance, or specialty, &c., whereof there is no execution or extent served and executed upon the bankrupt's estate *before* he became bankrupt, shall not be relieved upon any such judgment or other security for more than a rateable part of their just debts with the other creditors of the bankrupt. It should seem to have been the object of the legislature in framing this provision to deprive judgment or specialty creditors of any priority or preference derived from the teste of the writ or otherwise, unless the execution was not only served *but actually executed* before the bankruptcy. And if such judgment creditor had fallen within the operation of the 1 Eliz. c. 7, s. 2, as claiming *by, from, or under* the bankrupt, this 9th section of 21 Jac. 1, c. 19, depriving every creditor by judgment of the right to receive more than a rateable part of his just debt in common with other creditors, would have been unnecessary. The same statute, 21 Jac. 1, c. 19, declares that all the statutes made against bankrupts shall be largely and beneficially expounded in favour of creditors; and I presume it is in obedience to this enactment, coupled with the statute 13 Eliz. c. 7, that the doctrine of relation was established for the purpose of avoiding all intermediate acts done by the bankrupt between the time of the act of bankruptcy and the assignment of the commissioners, for the suppression of fraud, and with a view to insure an equal distribution of the bankrupt's property amongst all his creditors.

The 6 Geo. 4, c. 16, which repeals all the former acts, and consolidates their most valuable provisions into one statute, by the 63rd section directs the commissioners to

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assign for the benefit of the creditors of the bankrupt all the present and future personal estate of such bankrupt, and all his property and his debts; and vests the property, right, and interest in such debts as fully as if the assurance whereby they are secured had been made to *them*. And, after such assignment, enacts that neither the bankrupt nor any person claiming *through or under him* shall have power to recover or release the same, but such assignees shall have the like remedy to recover the same as the bankrupt himself might have had if he had not been adjudged bankrupt. This section seems to have been penned in conformity with the spirit and meaning of the statute 13 Eliz. c. 7, and requires not a more enlarged construction. Assuming, therefore, that there are no legislative enactments which create a liability in the sheriff, either express or necessarily implied in a case circumstanced like the present, I proceed to examine the leading judicial determinations applicable to the subject; and, after reviewing all the authorities in succession, from *Bailey v. Bunning* to *Balme v. Hutton*, and comparing them with care and attention, I consider them (more especially the earlier ones) as recognising an exception in favour of the sheriff, founded upon his character of a public officer and minister of justice, who, being the servant of the law, stands distinguished from third persons, who are under no legal obligation to intermeddle with the property of the bankrupt, and therefore act at their peril. It cannot be disguised that it is difficult (indeed impossible) to reconcile the later cases of *Potter v. Starkie*, *Lazarus v. Waithman*, *Price v. Helyar*, *Wyatt v. Blades*, and *Dillon v. Langley*—which decisions are in my judgment erroneously supposed to have emanated from the authority of *Cooper v. Chitty*—with the earlier decisions of *Turner v. Felgate*, *Bailey v. Bunning*, *Lechmere v. Thorogood*, *Phillips v. Thompson*, and *Cole v. Davies*. Great reliance being laid on the case of *Bailey v. Bunning* by the counsel for the plaintiff in

Balme v. Hutton, the record was searched, examined, and criticised in the Court of error. It was there treated as a case badly and imperfectly reported, and as not stating the ground on which the judgment of the Court proceeded; that the jury found a demand and refusal, but no conversion; that the question for the Court turned upon the taking. In the several reports of this case there is a perfect accordance, both in the statement of the facts, and on the precise ground on which the judgment of the Court was pronounced. It was objected that the special verdict was imperfect, inasmuch as it found only that the goods had been seized, and still remained in the hands of the defendant, neither sold nor delivered to the execution creditor; that a commission issued under which an assignment was made; and that, after such assignment, the plaintiff demanded the goods &c. of the defendant, who refused upon request to deliver them; but, whether upon all the matters aforesaid they were well taken, the jurors were altogether ignorant, and therefore prayed the advice of the Court, to whom if it should appear they were not rightly taken, they said the defendant Bunning was guilty. To this special verdict it has been imputed as a defect, that no conversion was found by the jury; and that the Court are not competent to find facts or draw conclusions for them. Whereas I apprehend that the frame of the record is perfectly correct, inasmuch as the jury, if they had found a wrongful conversion, would have concluded the point which they intended specially to reserve for the consideration and judgment of the Court. It was insisted that the attention of the Court had been addressed to the single consideration whether the *taking* was lawful; that, inasmuch as there was no sale or actual conversion of the property, but a taking only, and a detaining of it after a request to deliver it, the facts found were not sufficient to enable the Court to decide that trover could be maintained. It is clear, however, to my understanding,

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that no objection was taken to the *form* of the special verdict. And if there had been ground for any such objection, I conceive a *venire de novo* would have been awarded. I think, therefore, that we are bound to conclude that the case was adjudged upon the single point recorded by every reporter, viz. "That the sheriff, *being an officer, was obliged to execute the writ, and could not know of the act of bankruptcy, or that any commission would ever be issued out.*" I have commented at some length upon this case, because it occurred within a few years after the statutes of 13 Eliz. and of James came into operation; and it may be regarded as the foundation upon which the cases of *Lechmere v. Thorogood*, *Cole v. Davies*, and I might add the memorable case of *Cooper v. Chitty*, were afterwards decided. It appears from Keble, that, upon the argument of *Bailey v. Bunning*, the case of *Turner v. Felgate*, adjudged in the Court of King's Bench during the Commonwealth, about nine years before *Bailey v. Bunning*, was referred to by Lord Chief Justice Keeling. It was an action of trespass against a man who, having recovered a judgment, had levied under an execution. The judgment was afterwards vacated, and restitution awarded; and thereupon the defendant in the original action brought trespass against the plaintiff; and it was there resolved that the party who went with the sheriff to shew him where the goods were, was a trespasser ab initio; but the Court agreed that the *sheriff was not suable or chargeable*. Lord Chief Justice Keeling agreed that trespass would lie against the party; but added, "The case is otherwise against an officer, as here, to whom *relation* shall work no wrong." Mr. Serjeant Levinz, in his report of the same case, desires the reader to note the difference between charging an *officer* and charging the *party*; for (he adds), in *Bailey & Bunning's* case hereafter, it is held that the *officer* shall not be chargeable, where, perhaps, the *party* will be charged. I am aware

that the Court five years afterwards, in Easter Term, 15 Car. 2, expressed their dissatisfaction with this judgment, and said that *tel relation ne ferra ascun home trespassor* (a); but the reason of the doubt and dissatisfaction thus expressed seems rather to confirm than weaken my position that a distinction has always been recognised in favour of a public officer and minister of justice; for, if such relation should make no man a trespasser, a fortiori it ought not to operate to the injury of the sheriff. That in *Leckmere v. Thorogood*, Hilary Term, 2 & 3 Jac. 2, the same principle was established and the same distinction recognised, is apparent from the report of that case in Shower. It was an action of trespass brought by the assignees of a bankrupt against the sheriffs of London and the execution creditor. Upon the second argument Sir B. Shower says: "I now argued it again upon this point, that, though by the statutes of bankrupts the property of the goods be vested in the assignees, yet this relation *shall not work a wrong* to make the officers trespassers, who had a good authority, and took the goods lawfully; and so is the case of *Bailey v. Bunning*. And the Court was clear that the verdict was against the plaintiff, and that this action lay not against the officers, though trover would against the party. No language can more clearly convey the decided opinion of the Court, that neither trespass nor trover could be maintained against the officers, than the addition of the words "against the party." Upon judgment being given for the defendant, an action of trover was afterwards brought by the same plaintiffs, in the Common Pleas, against the same parties, when Sir B. Shower advised the plea to be drawn which is incorporated into the special verdict and prefixed to the report of the case in Ventris, stating the record in the former action of trespass, and averring that the cause of

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action and the parties were the same, and that the former judgment was a bar. The plaintiffs demurred, and upon the argument the whole Court was clearly of opinion that the judgment in the former action was a bar, the actions being of the same nature. According to the report of this case by Comberbach (who was recorder of Chester, and a Welch Judge), the question was, whether the extent came too late, or whether the *fi. fa.* was well executed, so that the assignees could have no title to goods which were before taken in execution, and so in *custodia legis*. Neither the facts of the case nor the judgment of the Court are very perspicuously reported; but, being again spoken to in a subsequent part of the term, this passage will be found in that reporter (*a*)—“Afterwards, in this term, the Court was of opinion that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time; and *Bailey & Bunning's* case, in Siderfin, agrees—Per Holt and Dolben, Trinity Term, 1 Will. & Mary, B. R.” In confirmation of the same doctrine, I would shortly refer to the case of *Phillips v. Thomson* (*b*), where, a question arising whether the goods of a bankrupt were bound by the mere delivery of the writ to the sheriff, and before the writ was actually executed, the Court said that the case of *Bailey v. Bunning* was resolved only in excuse of the bailiff, that he should be excused for executing the writ, and not that the goods were bound by the delivery of the writ. In *Cole v. Davies*, the same principle was recognised and the same point ruled in the same distinct terms, by Lord Chief Justice Holt, at Nisi Prius, in Hilary Term, 10 Will 3, at Guildhall. “If A. be bankrupt before seizure, and, after bankruptcy, the sheriff under a *fi. fa.* upon a judgment against A., seizes the goods and sells them, and a commission of bankruptcy is granted, and

(*a*) Comb. 123.

(*b*) 3 Lev. 191.

the goods are assigned by the commissioners, the assignees may maintain *trover* against the vendee of the goods ; but *no action will lie against the sheriff because he obeyed the writ.*" Lord Mansfield, in commenting upon this case of *Cole v. Davies*, as reported by Lord Raymond, takes occasion to observe that the notes were taken by him when very young, and that they are too incorrect and inaccurate to be relied upon ; at the same time his Lordship (when speaking of the four general resolutions upon the evidence at *Nisi Prius*) remarks that the first resolution is an obiter reference to the determination in *Bailey v. Bunning* ; and that it might not be at all material to attend to the distinction between *trover* and *trespass*. "Besides (he adds) the case there put is of a sale by the sheriff before the commission, and the *conversion might be as excusable as the taking*, because he obeyed the *writ*, whereas *here* the goods were not *sold* till after both the commission and assignment. It is a loose note of what was said obiter. It manifestly refers to *Bailey v. Bunning*, but is no authority applicable to the present case." I cannot but believe that this note of Lord Raymond's, of *Cole v. Davies*, would have been treated by Lord Mansfield with more respect if his Lordship had remembered that Lord Holt was Chief Justice when *Lechmere v. Thorogood* was decided, and, according to the report of that case in Comberbach, cited *Bailey v. Bunning* from Siderfin, as an authority to prove that a construction should not be made to make the officer a trespasser by relation, because the taking was lawful. It is true that *Cole v. Davies* was a *Nisi Prius* decision only ; but, in my judgment, it derives additional authority from being the echo of Lord Holt's judgment, delivered after much consideration, about ten years before, in *Lechmere v. Thorogood*. In commenting upon these several cases of *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, Lord Mansfield, according to Lord Kenyon's report of *Cooper v. Chitty*, observes—"These cases have

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determined that the taking of the goods was lawful. But how was the seizure lawful? Is it meant that it was lawful as against the assignee, or in any sense to change the property? Clearly not, for the assignees will pursue and avoid every disposition, even in market overt. No more can be meant than this, that the sheriff, not knowing any thing of the secret act of bankruptcy, or that a commission would be taken out, shall not be punished as a wrong-doer for the taking, which, though not lawful against the assignees, yet was innocent and excusable." Having, therefore, shewn that the earlier series of cases have distinctly recognised the act of the sheriff as excusable, although not lawful in the strictest sense of the term, I proceed to consider how far the case sub judice is affected by the judgment of the Court in *Cooper v. Chitty*. It must ever be remembered that in that case the seizure by the sheriff was *before* and the sale *after* a full knowledge of the commission and assignment. Lord Mansfield, through the whole of his elaborate judgment, directs the attention of his hearers to the strong and conclusive fact against the sheriff in that case, that the sale, which was the *wrongful conversion insisted upon*, was after the *commission and assignment*, both of which acts are treated as matters of public notoriety. He never loses sight of this most important circumstance, as establishing a marked distinction between *Bailey v. Bunning* and *Cooper v. Chitty*. In adverting to the hardships to which it had been insisted the sheriff might be exposed, his Lordship proceeds to say, that "a case of hardship can hardly exist upon the sheriff when the *taking and sale*, or even the *sale only*, are subsequent to the *assignment*. But, in the present case, the sheriffs knew of the *bankruptcy* before they sold the *goods*." And he concluded his judgment in these memorable words: "The seizure here is after the *bankruptcy*, and therefore after the *property by relation* is vested in the *assignees*. *But that*

was innocent and excusable, and the sheriff shall not be liable by relation as a wrong-doer. The gist of the action is the wrongful conversion by the sale and false return long after the commission and assignment." I therefore pray in aid the case of *Cooper v. Chitty* as confirming the doctrine that the sheriff can neither be deemed a *trespasser*, nor a *wrong-doer* by *relation* so as to be liable in trover. I admit the doctrine by relation to the full extent to which it can be found necessary to carry it for the purpose of suppressing fraud and insuring the equal distribution of the whole of the bankrupt's property amongst the general mass of creditors. But there I would stop; treating it as alike unjust and impolitic to stigmatize as a *wrong-doer* a public officer and minister of justice acting at the time strictly in obedience to the law. Much stress has been laid upon the expression reported to have been used by Lord Mansfield, that the sheriff cannot be made a *trespasser* by *relation*, as if he might still be regarded by the eye of the law as a *wrong-doer* in an action of *trover*; but if, instead of carping at particular expressions, the entire judgment be reviewed, which is necessary in order to give a consistent construction to the whole (and for this purpose the reports of *Cooper v. Chitty* by Sir James Burrow and Lord Kenyon should be carefully compared together), I conceive it will be apparent that his Lordship used the word "*trespassers*" because he was speaking of the action of trespass; but, when speaking of the act itself, in contradistinction to the form of *action*, he never intended to designate the sheriff as a *wrong-doer*, so as to have incurred the guilt of a wrongful conversion. It cannot be disguised that in *Cooper v. Chitty*, as reported by Sir William Blackstone, Lord Mansfield, in commenting upon the length of time which intervened between the assignment and the sale and the return, and stating that the notoriety was extremely great, is reported to have said: "But, had the sale been immediately after the

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seizure, still the sheriff would have been liable." This, I conceive, must have been an inaccuracy of the reporter. No expressions of a similar import are to be found either in Sir James Burrow's or in Lord Kenyon's notes; no such point was insisted upon at the bar; and it appears to be directly at variance with the whole tenor of Lord Mansfield's judgment, and with the declared opinion of all the same Judges of the same Court, in *Timbrell v. Mills* (a), which occurred in Hilary Term, 33 Geo. 2, about two years afterwards. That was a motion to stay proceedings against a sheriff who had paid over to the assignees of a bankrupt money levied under an execution, justifying himself on the ground that the money levied was clearly the property of the assignees, according to the doctrine laid down in *Cooper v. Chitty*, Michaelmas Term, 30 Geo. 2. But the whole Court declared "that it was allowed in that case, that, if the sheriff levies the money, and pays it to the assignees before any commission issued, and without notice of the act of bankruptcy, he will at all events be safe." In *Kitchen v. Campbell*, where money had and received was brought by assignees, to recover against a creditor money levied under an execution sued out after an act of bankruptcy, but before commission issued; and where the Court proceeded on the ground that a judgment for the defendant in a former action of trover was a bar to an indebitatus assumpsit for the same cause of action; Lord Chief Justice De Grey, in delivering the judgment of the Court, and commenting upon the title of the assignees to the property of the bankrupt by *relation*, is reported to have said—"Yet, notwithstanding this transfer of the property by *relation*, the sheriff is no *trespasser* by taking the goods under an execution after an act of bankruptcy, and before the commission issued—so ruled in *Lechmere v. Thorogood*, in Comberbach and Shower; and in *Cooper v.*

(a) 1 Sir W. Blac. 205.

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Chitty, in Burrow; but by *selling* (without explaining to his readers whether he meant a sale *before* or *after* the commission), the *sheriff converts the goods*, and then trover is maintainable against the sheriff or his vendee and the plaintiff in the original action." No authority is cited for the latter position; it was not a point in judgment before the Court, and no mention is made of it in the report of the same case in Wilson. The same principle which I conceive to have been established for a series of years in the cases I have cited, appears to have been recognised by still later decisions. In *Chippendale v. Bridges* (*a*), which was an action against the sheriff for a false return, the bankrupt was arrested on the 2nd of May, and lay in prison for two months, by which he committed an act of bankruptcy, which by relation was to refer back to the time of his arrest: on the 7th June a f. fa. issued, returnable on the 26th June; on the 18th the sheriff seized and levied 292*l.* 7*s.*; and on the 5th November he returned nulla bona. The question for the Court was, whether such return could be deemed false. With reference to the facts of the case, Lord Mansfield and the whole Court were unanimously of opinion, that, if the sheriff had returned that he had levied, &c., and *had actually paid the money to the plaintiff on the 26th June* (which was within the two months), the sheriff would have been excused, because it was impossible for him, at that time, to know that the defendant would lay in prison two months, and therefore he was under an invincible ignorance of this event. But the plaintiff could have no advantage by this, for still he would have been liable to refund the money, although the sheriff might be excusable in paying it to him. I regard this case as peculiarly strong in favour of the sheriff, who must have known that the trader had remained in prison seven weeks without giving bail, which afforded the strongest presump-

(*a*) 2 Burr. 819.

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tion of his insolvency, and a moral assurance that the imprisonment would terminate in bankruptcy; yet, being a *public officer*, the Court declared the sheriff would be excused, although the plaintiff, to whom he had paid over the money, would be liable to refund to the assignees. So, in *Lee v. Lopes*, which was an action for money had and received brought by the assignees of a bankrupt against the sheriff, to recover the proceeds of an execution at the suit of a judgment creditor, from which he claimed to deduct 140*l.* as a year's rent paid to the landlord—it did not appear from the Judge's report whether that sum was paid by the sheriff to the landlord before or after the notice of the bankruptcy; and the Court held that the deduction should not be allowed, unless the Judge, upon reference to his report, should find such to be the fact. This case is another instance to prove that the payment by the sheriff without notice of the act of bankruptcy would be excused, although the *party* receiving it would clearly be liable to refund. All the cases I have cited admit that the property became the property of the assignees by *relation* from the time of the bankruptcy; but they admit also that the *sheriff* was excusable, by reason of the invincible ignorance under which he laboured, as to the fact whether an act of bankruptcy, which might be considered as inchoate, would ever be complete. The last case I shall cite for the purpose of confirming the doctrine I have endeavoured to maintain, that the law will interpose its shield to protect officers and ministers of justice in the discharge of their duty, is *Smith v. Milles*. The question there, as in *Cooper v. Chitty*, was, whether the sheriff, who had seized the goods of a trader under a *fi. fa.* after a secret act of bankruptcy, and sold them after the commission but before the assignment to the plaintiff, could be considered a trespasser by *relation*. The Court, consisting at that time of Mr. Justice Ashhurst and Mr. Justice Buller, relied upon the authority of *Cooper*

v. *Chitty* as conclusive upon the very point. And Mr. Justice Ashurst, in delivering the judgment of the Court, refers to the cases of *Lechmere v. Thorogood* and *Bailey v. Banning* as decisive to shew that the officers shall not be made trespassers by relation. He says there is no instance where a man who has a new right given to him, which, from reasons of policy are so far made to relate back as to avoid all mesne incumbrances, shall be taken to have such a possession as to bring trespass for an act done *before* such right was given to him. He adds: "At all events, the rule will hold with respect to officers and ministers of justice." If it be insisted that trespass, being a possessory action, can be supported only by proof that the plaintiff was in possession when the trespass was committed, and therefore the gist of the action failed—I answer, if the right of property in goods became vested in the assignees by relation from the moment of the bankruptcy, such right of property would draw after it the right of possession, and so they might maintain the action. *Smith v. Milles*. I am aware it has been said, that, in modern times, and within our own memory, an opinion has prevailed with many learned and able men in Westminster Hall, that trover will lie, although trespass cannot be maintained; and numerous authorities have been quoted to warrant that position. I am constrained to acknowledge that the modern cases of *Potter v. Starkie*, *Lazarus v. Waithman*, *Price v. Helyar*, *Dillon v. Langley*, and *Balme v. Hutton* in the Exchequer Chamber, are in direct contradiction to the principle I am to establish as prevailing throughout the earlier cases. *Potter v. Starkie* was ruled by Mr. Baron Wood, at Nisi Prius, in 1807, and was cited in the argument of counsel in *Stephens v. Elwall*. It is there said that the Court of Exchequer, in banc, in Trinity Term, 1807, confirmed the opinion of Mr. Baron Wood, and held the sheriff liable in trover, though he seized, sold, and paid over the mo-

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ney before the commission issued, and before any notice; saying, "This necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods." So far from this following as a necessary inference from *Cooper v. Chitty*, Lord Mansfield considered the seizure in that case as a lawful interference to excuse the sheriff, but not lawful so as to support the act, or prevent the property from being considered by relation as vested in the assignees from the moment of the bankruptcy. Next followed *Lazarus v. Waithman*, in which *Potter v. Starkie* does not appear to have been adverted to; but the judgment of the Court proceeded upon the erroneous assumption that *Cooper v. Chitty* was a decision upon the very point. Lord Chief Justice Dallas, Mr. Justice Park, and Mr. Justice Burrough, built their judgment upon the foundation of that authority. Mr. Justice Richardson, indeed, expresses himself in terms more guarded and qualified. He says the law has been long since settled, and has frequently occurred of late years at Nisi Prius, viz. "If a sheriff takes the bankrupt's goods in execution *after* an act of bankruptcy, and *before* the commission, but sells them *after* it is issued, the assignees may bring an action of *trover* against him;" and he concludes his judgment in these words: "Although the defendants might not have known that a commission was about to issue at the time of the *seizure*, it forms no excuse for them for having *afterwards* proceeded to a sale"—viz. proceeding to a sale after notice. Mr. Justice Richardson, therefore, if correctly reported, seems to have misconceived the most material facts of the case then before him in judgment; as he laid down a rule perfectly inapplicable to those facts, because there, the execution being on the 15th November, the sale on the 21st December, and the commission not issuing until two days afterwards, and the assignment bearing date on the 6th January following, the seizure and the sale were *both* before

the commission. The case of *Price v. Helyar* is also undoubtedly an authority in favour of the plaintiff; there being no fact in that case which places the sheriff in a more favourable position than the present defendant; and the Court decided that he was liable in an action of trover brought by the assignees for selling the effects of a trader under an execution after a secret act of bankruptcy and before the commission issued. In delivering the judgment of the Court, after much consideration, and after ascertaining from Sir James Richardson (who had been counsel in *Potter v. Starkie*) that the Court of Exchequer had decided that case in the manner stated in Maule & Selwyn, and gave the reason there assigned for their judgment, Lord Chief Justice Best says: "That case depended upon the previous decision in *Cooper v. Chitty*, and we think the case of *Cooper v. Chitty* embraces the principle upon which we now decide." In all those cases, therefore, the Judges profess to have squared their decisions by the rule laid down by Lord Mansfield in *Cooper v. Chitty*. But, in justice to the memory of that great man, I am bound to observe that his masterly judgment cannot, without the abuse of language, bear the construction put upon it. I am aware that of late years this has been a prevalent opinion in some of the superior courts of Westminster Hall; and it may be said, "communis error facit jus;" but, unless I am tied and bound by the imperative language of an act of parliament, or by a series of authorities running in one clear and undisturbed current, I will never consent to subject a public officer to the injustice which such a decision must of necessity inflict upon him. The argument has proceeded upon the distinction between trespass and trover; but, as far as the sheriff is concerned, I can perceive no substantial distinction between them: both impute to him the character of a wrong-doer, where he has been guilty of no wrong;

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and liability to either the one action or the other operates in effect penal upon him; the difference consisting only in degree. He exposes himself to punishment if he refuses to execute the writ; and, if he executes it, to an action in which damages may be recovered to the full value of the property, although vigilance, caution, and pure good faith wait upon every step he takes in the discharge of his public duty. It may be said that the 6 Geo. 4, c. 16, s. 81 (which enacts that all executions and attachments against the goods of a bankrupt bona fide executed or levied more than two months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person at whose suit such execution or attachment shall have issued had no notice of any prior act of bankruptcy) has materially lessened the responsibility of the sheriff; and that the provisions of the late interpleader act, 1 & 2 Will. 4, c. 58, s. 66, which enables the sheriff to bring adverse claimants before the Court, and compel them to litigate between themselves these controverted questions at their own peril, operate powerfully in his favour. It must be conceded that these enactments, which are of modern date, indicate an anxiety in the legislature to mitigate the severity of the law when found to bear oppressively on her ministerial officers; yet I apprehend they afford no solid argument for fixing on the sheriff a liability which, in my humble opinion, is not warranted by any statute, or in accordance with the spirit and principles of the common law. If the question be asked, how could this opinion have prevailed for so many years, and have ripened into the authority of adjudged cases, unless built upon a solid foundation—I answer, that it may have originated in hasty decisions at Nisi Prius, in which great Judges may have been misled by the popular treatises and publications of the day. In the earlier edition of Cooke's *Bankrupt*

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Laws, and so late as 1804, when the 5th edition was published, the author of that treatise observes (*a*)—"That the sheriff who executes a fi. fa. upon the bankrupt's goods, after an act of bankruptcy committed, and *before* the issuing of the commission, is not a trespasser; but the assignees may maintain *trotter* against him." He then cites *Cooper v. Chitty*, *Smith v. Milles*, and *Cole v. Davies*; and adds: "It is true that formerly this seems to have been a litigated point, and much doubt was entertained upon the subject whether an *officer executing the process of the Courts* is not so far justified thereby as not to be subject to an action of any kind." In the edition of Bacon's Abridgment published in the year 1798, by Gwillim (*b*), will be found the following note:—"It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution *after* an act of bankruptcy and before the issuing of the commission;" and for this doubt is cited *Bailey v. Bunning* in the different reports of Levinz, Siderfin, and Keble; and it is added: "But it is now settled that the assignees may in such case bring *trotter* against him (citing *Cooper v. Chitty*), though the relation shall not operate so as to make him a *trespasser*." This I conceive to be an incorrect digest of the cases. If Mr. Gwillim or Mr. Cooke had fortunately referred to the edition of Lord Raymond published by my Brother Bayley in the year 1790, they might have corrected their own inaccurate analysis by the note of that learned editor in *Cole v. Davies* (*c*), which supplies all the information

(*a*) Cooke's B. L. 5 ed. 595.

(*b*) 1 Bac. Abr., ed. 1798, 440.

(*c*) No action lies against the sheriff for a sale before the issuing of a commission. D. Burr. 32, 34, 818; Bl. 829. If he sells the goods after the issuing of the

commission is notorious, an action of *trotter* may be maintained against him; R. Burr. 20; Bl. 65; D. Bl. 1064; though an action of trespass cannot. R.—l T. R. 475.

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which the cases then afforded, distinguishing between the points ruled and the obiter dicta, with a fidelity, accuracy, and nice discrimination peculiar to himself, and which may be traced in every step of his long and laborious judicial and most valuable professional life.

To conclude—Having examined and weighed with attention and care this great and grave question, I do not find any ground to warrant me in concluding that the liability of the sheriff, considered abstractedly from all legislative enactments, and from the authority of decided cases, can be said reasonably to result from the nature of his office, and the obligations and duties incident to it. I can find no acts of parliament, the legal or natural construction of which, in my humble judgment, create any such liability; and the judicial determinations upon the subject, more especially the earlier ones, when duly considered and compared with each other, appear to me to recognise and establish an exception in his favour. For these reasons, I am of opinion that the judgment of the Court below, upon the general question, ought to be reversed; but that the plaintiff is entitled to retain his verdict to the amount of 5*l.*

Mr. Justice LITTLEDALE.—In this case it is admitted on all hands that there must at all events be a verdict for 5*l.* With regard to the principal question, I see no reason to alter the opinion which I gave in the case of *Balme v. Hutton*.

Mr. Baron BAYLEY.—I am of opinion that the judgment of the Court of Common Pleas for the entire sum of 450*l.* for *all the premises* laid to the charge of the defendant below, and costs, is erroneous, and ought to be reversed; and that the plaintiff below ought to recover 5*l.* damages only, and costs, the value of such goods as were appropriated to pay the sheriff's poundage and costs. This is a question not between the assignees and the execution creditor, as to

whom the 21 Jac. 1, c. 19, s. 9, is as it seems to me conclusive: but it is between the assignees and the sheriff; and the difference between the execution creditor and the sheriff appears to me to make the whole difference in the case—to make that which is clearly unjustifiable as to the former excusable as to the latter. By the 21 Jac. 1, c. 19, s. 9, "every creditor by judgment, whereof no execution shall be served *before such time as his debtor becomes bankrupt*, shall not be relieved for any more than a rateable part of his debt with the other creditors of the said bankrupt;" so that Payne, the execution creditor, would clearly be accountable to the assignees for the value of these goods, for the eight parcels which were to satisfy his demand, and for the five parcels Payne was to sell to pay the sheriff's poundage, officer's fees, and other expenses. Before the 21 Jac. 1, c. 19, the rights of the assignees stood upon the 13 Eliz. c. 7, s. 2, and the 1 Jac. 1, c. 15, s. 5; and it is probable the provision was made in the 21 Jac. 1, c. 19, either because the earlier statutes did not include it, or to explain to what extent they ought to be carried. By the 13 Eliz. c. 7, s. 2, the disposition by the commissioners of the bankrupt's lands, goods, &c. shall be valid (*inter alia*) against all persons claiming *by, from, or under the bankrupts*, by any act made or done after such persons became bankrupts. By the 1 Jac. 1, c. 15, s. 5, it is enacted that the disposition by the commissioners shall be valid against all persons claiming *by, from, or under the bankrupts*, or any persons to whom conveyances shall be made without consideration by the said bankrupts, or by their means or procurement. If those statutes reached the case of an execution creditor seizing the goods of his debtor after an act of bankruptcy, then the 21 Jac. 1, c. 15, s. 5, was unnecessary. There can be no doubt but that the execution creditor would be liable, under the circumstances of the present case. But the question is, whether the sheriff does

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not stand in a different predicament, and whether his official character and duty do not arm him with an excuse. He acts not of his own motion, but as a minister of the Court from which the execution comes; he is not at liberty to act or not, as he thinks fit; it is his duty to act, and he may be punished if he forbears; and he acts not for his own benefit, but for the benefit of the execution creditor. He is the agent the law appoints to act for the such creditor. He is commanded by the King's writ, that of the goods and chattels of Leonard he cause to be made 607*l. 5s.*, which Payne had recovered by judgment against Leonard. Leonard has goods and chattels at the time *in his possession and apparent ownership*, and of which Leonard was the only rightful owner. It is true, indeed, his ownership was defeasible, and, under the bankrupt laws, was liable to be defeated as to all persons claiming by, from, or under the bankrupt (*a*); but it could not be defeated unless an act of bankruptcy had been committed, and unless at the time of such act of bankruptcy there were some creditor or creditors competent to sue out a commission, and unless such creditor or creditors afterwards thought fit to sue out a commission. But how is the sheriff to come to the knowledge upon these points? If the creditors are watchful, they may find out if an act of bankruptcy has been committed, and apprise the sheriff; and, if they are active, they may promptly sue out a commission; but, to hold that the sheriff shall be responsible to them for not discovering what they did not discover, or even when they did discover might conceal, is, as it seems to me, putting the sheriff, as an officer of justice, in a most unreasonable predicament. How is a sheriff to act? If he do what is his apparent duty, and seizes and sells, he is liable to be sued by the assignees. If he expects a commission, and ventures to return nulla bona, he is sued

(*a*) 13 Eliz. c. 7, s. 2.

by the execution creditor. If he applies to the Court for time to make his return, he must satisfy the Court that there are reasonable grounds for apprehension. Till within comparatively a short period of time, there was no limitation. An act of bankruptcy of six years' standing or more, if there were a petitioning creditor's debt of equal antiquity, would vacate any intermediate execution; and it would have been no answer that the creditor did know or might have known of the act of bankruptcy. And why is the sheriff, an officer of justice, to be responsible where the creditors are negligent? They have as good means as the sheriff of discovering whether there has been an act of bankruptcy. They can give the sheriff notice if they have grounds to suspect. If they are negligent, why should not the loss fall upon them? I put these preliminary questions, because, if the authorities are conflicting, they ought to be considered. *Bailey v. Bunning* is the first case upon the point. It was twice before the Court, first, in Trinity Term, 17 Car. 2 (1666), about thirty-eight years after the 21 Jac. 1; and again in Easter, 18 Car. 2. It was an action of trover. It was upon the first of these occasions that the quære mentioned in 1 Siderfin and 2 Keble was made. It was urged for the defendant that he ought to be found not guilty, because he was but bailiff, and had performed his duty, and had not converted to his own use; upon which (according to Siderfin) the quære is put. "Quære de cel; ca fuit affirme que le practice est," that the bailiff shall be found guilty if the party were then (adonque) a bankrupt. Keble explains by whom it was affirmed, viz. by Wilde, King's Serjeant, who said the constant course in London, in *trespass* against serjeants and bailiffs was, only to inquire whether the party were a bankrupt at the time of the taking. The quære, therefore, in Siderfin is, as it seems to me, entitled to less weight, because it was made before the case received the full consideration it afterwards had, and was

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made by counsel only, not by the Court. Upon an attentive consideration of the different reports, there appears to me no difficulty in discovering what the Court decided, and upon what ground. There was no difference as to the facts. On the 6th of June there was an act of bankruptcy, upon which a commission issued on the 17th. On the 11th of June a *f. fa.* was sued out, tested the 4th, upon which a seizure was made on the 14th. The jury found a special verdict, in which they stated that the goods had been demanded of the bailiff, who had refused to deliver them; but the conclusion was special upon the *taking*. If the *taking* was lawful, they found for the defendant; if not, for the plaintiff. This is now made clear by the reference which has been made to the record (*a*), and might before have been collected from 1 Levinz and 2 Keble. It was urged, in the course of the argument, that the teste of the writ of execution, which was before the act of bankruptcy, bound the goods; but it was answered, that that was not the case, except where the writ was tested on the day it issued; and that point was no further pressed. The case was then put, first, upon the act of bankruptcy, and, secondly, upon the special conclusion of the verdict: and upon the first point, the Court and the counsel agreed that the actual execution of the writ of *fieri facias* was not sufficient to prevent a division amongst the creditors; and the Court had no doubt, as to the property in the goods, that they were liable by the express words of the statute; but the doubt was, whether the relation should enure so as to make the sheriff punishable. *Butler & Baker's* case—the leading decision upon the effect of relations, which lays it down “that no relation, which is a fiction in law, shall make that tortious which was lawful, and that relations are to *certain respects and purposes*, and extend only to certain persons,” so

(*a*) *Vide ante*, Vol. 3, p. 6, n.

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that of two persons a relation may bind one and not the other—was referred to; and the judgment was given for the defendant, *he being an officer obliged to execute the writ, who could not know whether any act of bankruptcy had been committed, or whether any commission would be sued out.* No one can, to my judgment, read the report in 2 Keble and in 1 Levinz without seeing clearly that *that* and *that only* was the ground of the decision; and that the second point upon the special conclusion of the verdict formed no ingredient in the adjudication. Upon that point, however, I will just observe, that it had been so held in the term in which this case was before the Court; and first, that a wrongful seizure is a conversion; and, in *Bruen v. Roe* (a), that *an actual seizure of goods is a sufficient conversion;* and that trover will lie upon it, though there is no demand of the goods, or refusal: and, secondly, that, where a demand and refusal are objected to in a special verdict, as being evidence only of a conversion, the proper course is, not to give judgment for the defendant, as was done in *Bailey v. Bunning*, but to award a *venire de novo* (b). The case, therefore, of *Bailey v. Bunning* appears to me a distinct authority upon the point now in question; it made the distinction between *the title to the goods*, which they held bound by the bankruptcy, and the *officer*, whom they held excusable in taking them, because he was not found to be cognizant of the bankruptcy: and it was explained by the Court eighteen years afterwards, in *Phillips v. Thompson*, *as resolved solely in excuse of the bailiff, who ought to be excused for executing the writ;* and not that the goods were bound by the writ. *Lechmere v. Thorogood* was decided in 1689. It was trespass by the assignees of Toplady, a bankrupt, against the sheriffs of London and others, for seizing goods under a *fieri facias* against Toplady. The *fieri facias* was tested

(a) 1 Sid. 264.

(b) 1 Wils. 56.

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on the 27th of April; but there was no seizure under it until the 29th; and in the interim, viz. on the 28th, Toplady became bankrupt. Afterwards an extent issued; but that was held too late; so that the question was between the assignees and the sheriffs. The report in Modern seems to have mistaken the question and the ground on which the Court proceeded. But Shower, who was counsel in the cause, and likely to know the true grounds of the decision, puts it upon the distinction between *the officer and the party*; that, though the relation would enure against the latter, it would not against the former; and Comberbach puts it upon the same ground, that a construction should not be made to make *the officer a trespasser by relation*. Shower's report is this: "I argued it again upon this point, that, though by the statute of bankrupts the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officers trespassers, who had a good authority, and took the goods lawfully; and so is the case of *Bailey v. Bunning*."—"The Court was clear that the verdict was against the plaintiff, *entire damages being given*; and that this action lay not against *the officers*, though trover would against *the party*." Comberbach's account of the judgment is: "The Court were of opinion that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time; and *Bailey & Bunning's* case, in 1 Sid. 271, agrees—Per Holt and Dolben." This, therefore, is another case in which a distinction is drawn between an officer and the party. It is said, however, that this was an action of trespass; and that, upon the principle that a man shall not be made a trespasser by relation, trespass will not lie against an officer though trover would. But, does this case profess to proceed upon any distinction between trespass and trover? and is it not obvious that it proceeds upon the distinction between the officer and the party? and is there in reality any substan-

tial difference between trover and trespass? and may not a man be made a trespasser by relation? for a seizure between the act of bankruptcy and the assignment by a *mere wrong-doer*, by one who had no writ or colour for seizing, can there be a doubt but that the assignees, when appointed, might bring trespass? The same relation which enables an administrator to bring trespass for an act between the death of the intestate and the grant of administration, would enable them (*a*): the goods as against the wrong-doer would have been *theirs* at the time of the seizure: the seizure, as against the wrong-doer, would have been an act of trespass, for which trespass would have lain against the wrong-doer (*a*). And, why should not the same be the case as against the sheriff, except upon the ground that the sheriff stands in a different situation from a wrong-doer. And, if he do, why should his protection be confined to the form of the remedy, and not be extended to the substance of the transaction? *Bailey v. Bunning* is in point, that it is to be extended to the substance of the transaction; and, according to Comberbach, it is upon *Bailey v. Bunning* that Lord Chief Justice Holt and Mr. Justice Dolben rely: and in the note to *Turner v. Felgate*, which was an action of trespass, the difference between charging an officer and charging the party is noticed; and *Bailey & Bunning's* case is referred to, where it is said, "the officer shall not be charged, though perhaps the party should." *Smith v. Milles* notices the same distinction between officers and ministers of justice and others; and *Lechmere v. Toplady* (*b*), in which the Court seemed to think the judgment in *Lechmere v. Thorogood* a bar to a fresh action of trover for the same cause, seems to me to imply that there is no difference in this respect between an action of trespass and an action of trover. I think, indeed, that

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(*a*) *Roll. Abr. tit. "Relation," A. 1.* (*b*) *1 Vent. 169; 1 Show. 146.*

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Lechmere v. Thorogood and *Lechmere v. Toplady* might both have been impeached, upon the ground that they were allowed to protect persons who were not officers; but, as far as they protected the officers, I should have thought them right, if the officers had pleaded separately. *Cole v. Davies* lays down the same distinction between the sheriff and any other person, as ruled by Lord Chief Justice Holt, at Nisi Prius, Hilary, 10 Will. 3; and though Lord Raymond might then be young, his reports began at an earlier period, viz. Pasch. 6 Will. 3; and between four and five hundred pages of his reports, which shew considerable powers, are before that period. The point there ruled was this:—"If A. be bankrupt, and the sheriff upon a fi. fa. against A. seize and sell the goods, and a commission of bankruptcy is then granted, the assignee of the commissioners may maintain trover against the vendee of the goods; but no action will lie against the sheriff, because he obeyed the writ." And whoever will take the trouble to look into the edition of 1789, will find that the then editor entertained that opinion of *Cooper v. Chitty* I entertain now. That case, as I have always understood it, is in my judgment conclusive of this. It proceeds, as it seems to me, not merely upon the distinction of trespass and trover, though that distinction in cases in which the facts warrant it may exist; but upon two other distinctions—one between the sheriff, when acting in ignorance, and therefore free from blame, and other persons—and the second between a sheriff acting in ignorance, and a sheriff acting with notice; and Lord Mansfield seems to have considered a sheriff when acting in ignorance, for whatever he did whilst in such ignorance, whether by seizing or selling, excusable, though other persons would have been answerable; but as having no excuse when he acted upon knowledge. And in that case he held the seizure by the sheriff, when in ignorance of the bankruptcy, though not lawful, yet excusable; and he held the subsequent sale

by the sheriff, when he had full notice of the bankruptcy, not excusable, but a wrongful conversion, because of that notice. This, to my reading, is the substance of *Cooper v. Chitty*; and how it can be brought to bear upon a case in which the sale by the sheriff is in ignorance, and therefore innocent, I cannot see. And here I may be allowed to correct a mistake into which a learned Judge, Mr. Justice Park, is represented to have fallen, and for which explanation I am satisfied no one will be more thankful than that learned Judge. He is supposed to have thought that the judgment delivered in the Exchequer had "charged Lord Mansfield with a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in eight lines." I was sure no such charge was intended; and, on referring to the reports, I find no such charge made. What the reports stated to have been said was—"Unless Lord Mansfield meant to convey the notion of perfect indemnity to the officer where there was perfect ignorance, he made a very useless display, &c.;" but, so far from thinking that he had made a useless display, the impression was, that he had most *usefully* investigated the authorities, and explained their bearing, and had thereby established the position, that, where there was perfect ignorance, there *ought* to be *and was* perfect indemnity to the officer. The distinction in *Cooper v. Chitty*, between trover and trespass, I take to be this—that, in trespass, the taking is the gist, and therefore there must be a wrongful, i. e. an inexcusable taking; but that, in trover, the conversion is the gist, and therefore that a wrongful, i. e. an inexcusable conversion, is sufficient, though the taking were excusable. But that the conversion might be deemed excusable, even in trover, and would in that case be an answer to the action, I think may fairly and clearly be collected to have been the impression on Lord Mansfield's mind. Let me, however, examine Lord Mansfield's judgment,

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that I may see whether I come to a right conclusion. He begins by defining the action of trover, and describes two things as requisite, i. e. property in the plaintiff, and a wrongful conversion by the defendant. He considers the property in the assignees from the 4th of December before the seizure; and then says, the only question is, whether the defendants (the sheriffs) were guilty of a wrongful conversion. "That the conversion itself was wrongful, is," he says, "manifest. The sheriffs had no right to sell the goods of the plaintiffs, the assignees, but of Johns only. The vendee would have no title to the goods; the plaintiff in the execution no right to retain the money." Still he thinks something more is to be considered before the conclusion is reached, that the sheriffs are responsible and the action against them maintainable. "If the thing be clearly wrong, the only question remaining is [so that he thought there was still a question behind], whether the defendants are excusable, though the act of conversion be wrongful." He further notices, that "the bankrupt statutes do not make men trespassers or criminal by relation, who have innocently received goods from him, or *executed legal process, not knowing of an act of bankruptcy*; that was not necessary, and would have been unjust." He then notices that the injury complained of was not the *seizure*, but the *wrongful or injurious conversion* by the sale; and then proceeds to shew that the sheriffs' sale was not in ignorance, but with full knowledge, twenty days after the commission and assignment. The sheriffs, therefore, did not come within the rule he had mentioned, of an officer executing legal process, not knowing of an act of bankruptcy: they were, therefore, not excusable: they had acted *with full knowledge of the bankruptcy*. Now, to what purpose was the consideration whether the sheriffs *had knowledge*, if they would be equally liable, as is contended here, though they had *no knowledge*? Lord Mansfield then proceeds to answer the objections that had

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been taken, and particularly this—"that the taking was lawful, and therefore the sheriff was bound to complete it by a sale;" to which he replies, "that the taking was not *lawful*, because they were then the goods of the assignees; and, if the taking were lawful, the sheriff should not have gone on *when the discovery was made*." He then proceeds to explain how far the taking was to be deemed lawful, how far not, in a way which, to my mind, is conclusive of the present case. "To support the act," he says, "it is not lawful; but to *excuse the mistake of the sheriff*, through unavoidable ignorance, it is lawful. Or, in other words, the relation introduced by the statutes binds the property; but men who act innocently at the time are not made *criminal* by relation, and therefore they are *excused* from being punishable by action or indictment as trespassers: what they did was innocent, and in that sense lawful. But as a ground to support a *wrongful conversion*, by sale, *after a commission publicly taken out, and an actual assignment made, it was not lawful*." He then notices *Basley v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, and the points established by them in favour of the sheriff; and, after a caution against placing too great a reliance on *Cole v. Davies*, he says: "Besides, the case there put is of a sale by the sheriff *before the commission*; and *the conversion might be as excusable as the taking, because he obeyed the writ*. Whereas here, the goods were not sold till after both commission and assignment." Now, how the conversion could be excusable, except upon the ground I have stated, I do not see. In conclusion, Lord Mansfield says: "The seizure here is after the act of bankruptcy committed, and therefore after the property is vested by relation in the assignees; but that was *innocent* and *excusable*: and the sheriff shall not be liable by relation as a *wrong-doer*. The gist of this action is the *wrongful conversion* by the sale and false return long after the commission and assignment." Now,

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if ignorance at the time of *taking* will excuse the *seizure*, I cannot see, upon principle, why ignorance at the time of selling should not excuse a sale; and the reference by Lord Mansfield to *Bailey v. Bunning* and the other cases, and his observations, after citing *Cole v. Davies*, seem to me to shew, as plain as conduct and words can shew, that ignorance would equally excuse both. I am, therefore, of opinion, that *Cooper v. Chitty*, instead of being an authority for the plaintiff below, or standing indifferent, is a very strong authority—an authority in point for the sheriff. *Smith v. Milles*, in 1786, was trespass against the sheriff for seizing the goods of the assignees on the 23rd of February, 1786: the sheriff pleaded not guilty, and justified under a *fi. fa.* against the bankrupt. The plaintiffs proved an act of bankruptcy on the 1st of February, and a sale by the sheriff after the commission, and in defiance of notice, but before the assignment to the plaintiffs. The defendant demurred to the evidence. The questions principally discussed at the bar were, whether the assignees could be considered as having such a possession at the time of the seizure as would enable them to maintain *trespass*; for, it was admitted that the sale would have been a sufficient foundation for an action of trover; but it was also said (*arguendo*) that the sheriff ought to be better protected than any other wrong-doer, for he is compelled to do his duty, and does not act from his own choice. The Court (consisting only of Mr. Justice Ashurst and Mr. Justice Buller) thought the point settled by *Cooper v. Chitty*, and decided in favour of the defendant—first, on the ground, that, where a new right is given, which, from reasons of policy, is made to relate back, to avoid all mesne incumbrances, the party shall not be taken to have such a possession as to bring *trespass* for an act done before such right was given him—but, at all events, secondly, on the ground that the rule would hold with respect to *officers and ministers of justice*; for which

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Mr. Justice Ashurst cited *Lechmere v. Thorogood*, which was trespass; and added, the same doctrine is recognised in *Bailey v. Bunning*, which was trover. He adds also the passage from *Cooper v. Chitty* which shews on *what ground* a wrongful conversion would make trover maintainable where trespass would not lie, because the conversion is the gist of the action of trover, and the action will equally lie, whether the taking were excusable or not; whereas the *taking* is the gist of the action in trespass, and, if the taking be excusable, the action cannot be supported. And he concludes: "The plaintiffs are not injured, as it is competent to them to recover *the value* of the goods by bringing an action of trover." [there being clearly in that case a conversion by the sheriff, which, as against him, could not be deemed otherwise than wrong-
ful]. But the officer shall not be harassed by this species of action (i. e. trespass), in which the jury might give vindictive damages." The distinction, therefore, I have mentioned between the sheriff and other officers of justice on the one hand, and other persons on the other, as first established in *Bailey v. Bunning*, in 1668, is recognised in *Phil-
lips v. Thompson*, in 1685, is acted upon in *Lechmere v. Thorogood*, in 1688, is adopted in *Cole v. Davies*, in 1698, and is again recognised in *Cooper v. Chitty*, in 1756, and in *Smith v. Milles*, in 1784, and is never during that period questioned or impeached; and it seems to me it ought to continue a guide for our decision, unless we find it satisfactorily overruled, or unless we feel a conviction that it is founded upon untenable principles. In *Kitchen v. Camp-
bell*, the first action was against the sheriff and the execution creditor; and there was a verdict *for both*; so that any distinction between the one and the other was unnecessary, and, as to what related to the sheriff, extra-judicial; and what is said as to the sheriff is reported in *Blackstone* only, and not in *Wilson*. The first case I am aware of in which this distinction was disregarded is *Pot-*

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ter v. Starkie, in the Exchequer, Michaelmas Term, 1807, in which the Court held that the sheriff was liable in trover, though he seized, sold, and paid over the money before the commission issued, and before any notice; saying this necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods. In *Wyatt v. Blades*, the distinction certainly was not noticed. The only question made was, whether *a removal of the goods by the sheriff to a broker was a conversion*: and Lord Ellenborough held it was. In *Lazarus v. Waithman*, *Bailey v. Bunning* and *Phillips v. Thompson* were certainly cited at the bar, but neither of them is noticed in the judgment of the Court; and, as the case was at once disposed of by the refusal of a rule nisi for a new trial, there was no interval before the case was disposed of for looking into the authorities. *Lee v. Lopes*, in 1812, is in favour of the distinction I have mentioned, rather than against it. The sheriff seized and sold after a secret act of bankruptcy. *All* the goods produced 520*l.*; the sheriff paid the landlord a year's rent, 149*l.*; and whilst the money was in the sheriff's hands, the assignees brought money had and received against him. The right of the assignees to the bulk of the money was clear; the only question was, whether the sheriff had a right to deduct the 149*l.*; and the plaintiff had a verdict, with liberty to move to add that sum to the damages. Rule nisi accordingly: and, upon cause being shewn, it not appearing whether the payment was before notice of the commission or not, the Court inquired how that fact was; and the counsel not being able to answer the question, the Court said it was for the defendant, the sheriff, to shew that the payment was before notice of the commission; and they ordered the addition, unless the Judge's note should shew such was the fact. As against the sheriff, therefore, the point was put, not upon the time of the act of bankruptcy, but *upon the point of notice of*

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the commission. In *Price v. Helyar* Lord Chief Justice Beat, in delivering the judgment of the Court, goes no farther back than *Cooper v. Chitty*. He notices none of the earlier cases: and, though it is stated in the report in *Moore & Payne*, that *Bailey v. Bunning* was cited, it is not cited in detail, nor noticed in the judgment. *Dillon v. Langley* merely follows *Potter v. Starkie*, *Lasarus v. Washman*, and *Price v. Helyar*. As to the principle upon which an exception in favour of a sheriff, when he acts ignorantly and innocently, is grounded, I have noticed it in the early part of the opinion I have been delivering; I can see nothing in it to which legal objection can be made. It is founded upon this, that a relation shall work no wrong; that a relation may bind one person where it does not bind another; and that the relation under the bankrupt laws, though it binds other persons, will not bind a public officer where he acts under the King's writ; and where what he does is *at the time he does it* in strict obedience to the King's writ, and warranted by it, and where it is only by a relation resulting from subsequent facts that what he has done can be impeached. I will only add, that, until a limitation was put upon this relation by modern statutes, the sheriff, if liable at all, would have been liable though a commission were not issued until five or six years after he seized; and that, if the creditors are not watchful, so as promptly to discover the act of bankruptcy—and active, so as speedily to issue a commission—I see no satisfactory reason why they should not lose the security of the sheriff. My opinion, therefore, is that the judgment as to all but 5*l.* ought to be reversed.

Lord Chief Justice DENMAN.—The question is, whether a sheriff who under a fieri facias seizes a debtor's goods and sells them after a secret act of bankruptcy and before a commission, thereby renders himself liable to an action of trover for the value of the goods taken. Looking first

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at this question with reference to authorities, it appears to me quite clear that the Court of King's Bench, in *Bailey v. Bunning* decided both *Balme v. Hutton* and the present case (for they are identical) in favour of the sheriff. I am aware of the acute observations lately made on the form of the record in the first-mentioned case; but they were not the grounds of the decision, nor do they appear to me well founded in themselves; Lord Chief Justice Kelynge, Mr. Justice Windham, and Mr. Justice Twisden, do not say that a sufficient conversion is not stated. And I do not see how they could have said so, when the defendant is alleged to have taken and detained the goods in defiance of a demand to surrender them. And though demand and refusal are not the fact of conversion, but only evidence of that fact, the statement of a demand and refusal cannot do away the taking and keeping previously set forth, which are a conversion. But those learned Judges do say that the bailiff was justified, being an officer obliged to execute the writ, who could not know whether an act of bankruptcy had been committed, or whether a commission would issue. They, therefore, in substance held that trover would not lie, because the conversion, though complete, was lawful; this was the point in *Balme v. Hutton*—decided in the affirmative by the Court of Exchequer, and in the negative by the Court of Error; negatived, also, by the Court of Common Pleas in *Carlisle v. Garland*, on which the present writ of error is brought. Of the twofold case of *Lechmere v. Thorogood*, of the cases of *Turner v. Felgate*, *Philips v. Thompson*, and *Cole v. Davies*, it is enough at this moment to say that some appear to me to proceed upon the authority of *Bailey v. Bunning*, and the others to recognise and adopt it. If then the case of *Cooper v. Chitty* had been in its facts precisely similar to these, I should have thought all the then existing authorities full in favour of the defendant; and I am satisfied that it would have been decided in conformity

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with them. It differed in particulars of less importance than that the sale was made after commission, assignment, and notice; it was the case of a sheriff who took upon himself to deal with the goods of a debtor after he knew that they had become the property of the debtor's assignees. A decision for the plaintiff did not in the least interfere with those former authorities, on some of which Lord Mansfield took the opportunity of throwing a degree of discredit. His Lordship deprecated the authority of *Lechmere v. Thorogood*, on account of the reporter's presumed inaccuracy in ascribing to Lord Chief Justice Holt opinions which that great Judge is supposed to have been incapable of holding, so erroneous are they declared to be. "Lord Chief Justice Holt could never say that the property of the goods is vested by the delivery of the f. fa.; and the extent afterwards comes too late; no inception of an execution can bar the crown." Such is Lord Mansfield's observation. But is this proposition so manifest an error? So far from it, Lord Kenyon, in *Rorke v. Dayrell*(a), states it to be the law; and doubts in his turn whether Lord Mansfield could have committed the error of denying it; and thinks that Sir James Burrow must have misreported him. Fortunately, however, for Burrow's credit, Lord Kenyon himself, when a young man, had taken a note of Lord Mansfield's judgment, which has since been published, and which agrees with that report. In a later case, Lord Ellenborough inclined to Lord Mansfield's opinion on this point: but, however it may be decided, when it shall have undergone such discussion as such a difference requires, the proposition imputed to Lord Chief Justice Holt, and re-asserted by Lord Kenyon, is clearly not so absurd as to invalidate the report which contains it. *Cole v. Davies* was indeed a *Nisi Prius* decision; but it was unquestioned—it

(a) 4 Term Rep. 402.

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was that of Lord Chief Justice Holt, fully aware of the former and the recent cases, and knowing the views both of his brother Judges and of the profession. The case is reported by another Chief Justice, Lord Raymond, whose authority as a reporter, at least, should have seemed beyond attack. Yet Lord Mansfield speaks slightlying of it, observing that Lord Raymond was young when he took these notes, and that they are too incorrect and inaccurate to be relied on. But is it really possible to believe that Lord Raymond was too young to understand what he heard? If not, his youth is immaterial in this argument; and are we then to discard as inaccurate and incorrect all that he reported in the first half of his first volume during the five years preceding? I cannot refrain from saying that we can rely upon none of our reports, if we admit a doubt that Raymond has recorded Holt's genuine doctrine, and that he understood it fully. Lord Mansfield's censure of these two cases is rendered the more remarkable by his labouring, and with success, to demonstrate their perfect consistency with the judgment he was at that time pronouncing. *Lechmere v. Thorogood* decided, that, though by the statute of bankruptcy, the property of the goods be vested in the assignees, *yet this relation shall not work a wrong* to make the officers trespassers, who had a good authority, and took the goods lawfully; and trespass lay not against the officers, though trover would against the party. So is *Cole v. Davies*; if A. was a bankrupt before the seizure, and the sheriff seize and sell his goods, and a commission and assignment follow, the assignee of the commissioners may maintain trover against the vendee of the goods; but no action will lie against the sheriff because he obeyed the writ. In the great case of *Cooper v. Chitty*, the special verdict stated very few facts—an act of bankruptcy, a writ of execution, seizure by the sheriff, a commission and assignment, notice of both to the sheriff, and sale by him. This was the order of events. The former cases had laid it

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down that seizure before commission would *not* maintain *trespass*; the Court decided, in *Cooper v. Chitty*, that a sale after notice of assignment *would* maintain *trover*. Whether the intermediate state of things that has occurred in *Balme v. Hutton* and in the case before us, a seizure and sale after an act of bankruptcy, but before commission, would support *trover*, was not in question. And most of the learned Judges who overruled the Court of Exchequer have admitted in plain terms, that *Cooper v. Chitty*, as a case, is no authority for deciding the present. Some, indeed, who gave their judgment recently in the Court of Exchequer Chamber, and more of their learned predecessors who adopted the same opinion, undoubtedly conceived *Cooper v. Chitty* to be a case in point. It was distinctly so stated by the eminent person who delivered the only considered judgment of a Court on this point; I mean the Lord Chief Justice Best, who expressly grounds his decision in *Price v. Helyar* on the authority of *Cooper v. Chitty*. Many of Lord Mansfield's observations, and more particularly those which tend to disparage the former authorities, may be fairly urged as evincing a disposition on his part to depart from them; but, with all possible veneration for that illustrious Judge, I cannot agree that observations and reasonings not required for deciding the point at issue ought to have the influence which has been so confidently claimed for them here. On the present occasion, I may be allowed to say that no man is more inclined to defer to judicial authority than myself; and I go much further; for, I think whatever has fallen from the sages of the law in the course of considering points submitted to them, entitled to the most respectful consideration. I cannot, if I would, divest myself of such feelings for understandings of that superior order, enlightened by general learning, and rendered acute by experience and practice. I dissent with caution from any proposition embraced by them, and distrust every conclusion of my own at which they have not

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arrived. But that the extrajudicial sentiments of the later Judge should overcome my confidence in the well-considered principles judicially established by former magistrates of equal name, a just respect for judicial authority itself forbids. Sir W. Blackstone, indeed, imagines Lord Mansfield to have actually said in some part of the judgment delivered by him in *Cooper v. Chitty*, that "the sheriff would have been liable, though the sale had been immediately after the seizure." But this inference is not drawn by his Lordship in the other reports of *Cooper v. Chitty*; that it was not drawn by the profession, is made manifest by Blackstone's own note, as well as by the case there cited of *Timbrell v. Mills*. It may be permitted me to pass over a long list of cases—*Bridger v. Chippendale*, *Aldridge v. Ireland*, *Vernon v. Henkey*—which appear to me, for the reasons detailed in *Balme v. Hutton*, to sanction the principles of the older cases, which was also recognised by *Smith v. Milles*, to the extent of relieving the sheriff from an action of trespass, even where a commission had preceded the sale. It cannot, however, be denied that an opinion adverse to the antient doctrine must have been all this time growing up in the profession. Particular phrases employed by Lord Mansfield in *Cooper v. Chitty* seem to have been more regarded than the decision itself, and the pains taken by his Lordship to guard against collision with that doctrine. This growing opinion has been spoken of by some whom I highly respect as a kind of authority to which Courts of justice ought to defer; and I willingly admit that an opinion universally entertained at the bar is very likely to be correct, and is not to be contravened without great caution. But the opinion to which I now allude has proceeded upon, at least it has been accompanied with, a remarkable error, now almost universally acknowledged to be such—the error of supposing that the decision in *Cooper v. Chitty* was at variance with the old cases. Nor has this opinion been universal in

Westminster Hall; for, the learned counsel for the plaintiff in error referred to text writers who published their dissent: one distinguished person, still I hope far removed from enjoying his full authority as a sober, careful, accurate, and conscientious inquirer after truth, can never be mentioned, even in his presence, in colder terms of commendation. I need not add, I am speaking of my Brother Bayley, who, in his character of editor of Lord Raymond's valuable reports, laid down the law, as he conceived it to exist in 1790, in strict conformity to the old decisions. But any opinion that had been shewn to have become universal must, if correct, be founded on just legal principles, and ought to have no other weight than it derives from them; and, if it could be traced to no such principles, but, on the contrary, was shewn to originate in a misconception of one decision and neglect of others, it would be entitled to no weight at all; and the proof of its being founded in error would undermine the decisions resting upon it. I think every decision may be properly submitted to such examination; indeed, it must, where difference of opinion exists. The opportunity of making it is that which gives their greatest value to the full reports now in the hands of the profession. The opinion admitted to have grown up after *Cooper v. Chitty* clearly appears to have influenced the learned Judges who decided *Potter v. Starkie*, *Lazarus v. Waithman*, and *Price v. Helyar*; cases which I do not examine in their several details, because I cannot deny that they are direct authorities against the plaintiff in error. The case which we are now considering was before the Court of Common Pleas in 1831, as *Dillon v. Langley* was before the Court of King's Bench in the Easter Term of that year. Both were decided entirely out of the class just alluded to. The present case was not even argued at the bar—the learned Serjeant who appeared for the defendant not thinking himself justified in making the attempt after the recent decision of the same Court in *Price*

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v. *Helyar*. In Trinity Term, in that very year, the case of *Balme v. Hutton* was brought before the Court of Exchequer, on a special verdict found by the jury on a second trial. After having taken time to consider, the Court pronounced the sheriff not liable in trover, under circumstances exactly similar to those now before us. Their judgment will be allowed to exhibit a patient and acute examination of authorities, combined with perspicuous reasoning upon them. It was unanimous. It has been revised in the Court of error from the Exchequer, and has been reversed by a majority of six learned Judges against one—all devoting equal care, learning, and talent to the argument. Lord Tenterden was present at the discussion at the bar; and, though his lamented death took place before the decision, the weight of his great authority must be added to the scale which then preponderated. If we look back from the present period to the reign of Charles the Second, it must be confessed that the history of this point exhibits an unusual array of great names and authorities on either side. From this consideration, and from observing the process of reasoning employed, as well as the very peculiar position of the other recent cases in Westminster Hall, I have been led to think the question still open to inquiry, and have done my best to investigate it upon principle. No conclusion could have been altogether satisfactory to my own mind, since none could have escaped collision with some of our most venerated predecessors and ablest contemporaries; and I may add, that, not insensible to the inconveniences of throwing doubt on the prevailing practice and opinion, the strongest inclination of my mind was to concur with the latest authority; but, I am bound to avow the opinion I have formed, which is, that, in this case, the sheriff is justifiable in seizing and selling the bankrupt's goods. I think him justified, because he did both in obedience to a lawful authority, which it would have been criminal in him not to obey.

He was commanded to seize the bankrupt's goods, and he seized them; and, the command being lawful, he was no trespasser. He was commanded to sell the goods so seized; for the same reason that sale cannot be a wrongful conversion. He was lawfully commanded to pay the proceeds to the execution creditor; and that also, in my opinion, he might lawfully do. His conduct was in all respects lawful at the time he acted. Can it be made unlawful by the accidental existence of a fact unknown to him, and by other facts occurring afterwards, without his participation or knowledge? I think it cannot. If it could, the law would, indeed, be hard and unjust, not to say monstrously iniquitous; and more especially before the 49 Geo. 3. But, if such be the law, it is not to be defeated by Courts appointed to carry it into effect, from those or from any such considerations; and my judgment proceeds not on the hardship or injury that might accrue to parties, but because the law would be in my opinion (and I must employ the only language that strikes me as appropriate) incongruous and absurd. The sheriff must take care to seize the debtor's goods he must inquire which are the debtor's goods; and, if he takes those of any other, he is answerable. But, in the present case, he does take the debtor's goods, and no other man's. The more diligently he inquires into the fact of property, the more clearly would it be proved: not only are they his at the time of seizure, even though an act of bankruptcy may have been committed, but they may continue so to his life's end. A most ingenious illustration was employed to shew how property belonging to a debtor at the time of seizure is affected by an act of bankruptcy, which was likened to a stamp or mark, invisible when set there, but brought to light by the commission and assignment. This kind of analogy sometimes furnishes a conclusive test. Pursuing it here for a moment, we perceive the King's lawful command, written in legible characters, expressed in plain

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words, unconditionally directing the seizure and sale of A.'s property. The duty of the officer thus addressed should appear to be unambiguous; but it is not impossible that the goods may have received a mark undiscoverable to his eyes; there is a second possibility, that the mark may be brought out hereafter; and a third possibility, that another contingent event may supervene, which would bring the inscription into full light, and even change the nature of the subject matter; at least, an equal possibility exists that no mark is there, that it may never become visible or lead to the change. Can it be that the same law should injoin one of its officers to execute that duty, and punish him for doing so? Lord Mansfield and some later Judges, in conformity to the language of antient cases, allow that the sheriff shall be protected by his writ against an action of trespass; but I humbly conceive the writ to be an equally good protection to him in trover; for, if it makes the seizure lawful, it cannot leave the conversion wrongful: a distinction which is here taken appears to me wholly gratuitous, founded on no legal ground, and inadequate to its purpose; he shall be protected (it is said) against vindictive damages, which might be awarded if trespass were the form of action; but, in trover, where the question of property is said to be the only one, and the damages to be limited by the value of the goods taken, he is responsible. I do not pause to ask why, if he has done an illegal act, he should not answer to the full extent of the injury arising from it; but the proposition that in trover the damages must be restricted to mere value, seems to me, speaking with all diffidence, to require proof: it would place detinue and trover on the same footing; but, inasmuch as the latter form of action enables a plaintiff to recover for the wrong done, I conceive that no legal bar exists to his obtaining damages fully commensurate to his loss, if his declaration be properly framed to include them. When it is intimated, as a consequence of denying the sheriff's lia-

bility, that the execution creditor must also escape liability, I wish to express some doubt, even if that were so, whether any absurdity would follow where all has been done before the issuing of the commission. Most commonly the execution creditor not only directs the sale, but keeps the proceeds; and, doing either after the commission, is liable, either in trespass for seizing the goods, in trover for converting them, or in assumpsit for keeping the money to which the assignees have become entitled. That he would be liable if he put the sheriff in motion before a commission, without ultimately obtaining the fruits of the execution, I am not prepared to affirm; but need not, for any purpose of the present case, dispute. It is in this way, as I conceive, that effect is to be given to the 6 Geo. 4, c. 16, following as it does, without material variation, the antient bankrupt laws. The property is changed entirely by the assignment from the moment of the act of bankruptcy; but for what purpose changed? for the purpose of giving the assignees an absolute interest in the property wherever it may be found, and securing to the creditors the benefit of every portion of it. They may compel its surrender from any hands, and make all who have raised money upon it account for that money to the bankrupt's estate; but a change in the property for this purpose cannot, as I apprehend, have the effect of visiting with damages as wrong-doers such as acted lawfully with respect to the property, and were compelled by the exigency of the law to act as they did. The doctrine of relation cannot, as I apprehend, be carried to this extent. I do not see on what principle, by varying the right of property at a by-gone period, the legality of personal acts already done can be affected. Sir Edward Coke, in the well-known passage often cited from *Buller & Baker's* case, imposes limits on the doctrine of relation, which are essential to prevent its working injustice—"Relations shall never be strained to the prejudice of a third person"—"Like other positions

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of the law, they are to certain respects and purposes, and extend only to certain persons." Further, it was said, "inasmuch as relations are fictions in law, which will never do wrong," that "no relation shall make that tortious which was lawful." The relation created by this clause of the bankrupt act has, indeed, been pronounced no fiction. I conceive it to be such, in causing the property to have resided in two different persons at the same time, and making that belong to the assignees from the act of bankruptcy, which at that time did belong, and might have continued to belong for ever, to the bankrupt. Sir Edward Coke's doctrine therefore applies; and I confess it appears to me decisive of the present question. And, while the relation changes the property in the respect and for the purpose of giving the assignees the complete beneficial interest in it from the time of the act of bankruptcy, it ought not to be strained to the injury of a third person, nor render tortious that seizure and that sale by the sheriff which were lawful when done. It may be observed, as by no means the least singular circumstance attending this remarkable case, that the doctrine, while in controversy, has become naturally obsolete by the operation of that useful reform introduced by Lord Tenterden into parliament, the Interpleader Act; the more general principles, however, and the analogies to be drawn from them, may still have an important influence on other cases. On this special verdict my opinion is, that the defendant in error is entitled to our judgment for 5*l.* only.

The Court being equally divided in opinion upon the principal question, the judgment of the Court of Common Pleas was affirmed—affirming the liability of the sheriff to the extent of the whole value of the goods seized.

Regulae Generales.

HILARY TERM, 4 WILL. IV.

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WHEREAS it has been found expedient to make alterations in the general rules made in Michaelmas Term last by this Court (a) for the purpose of carrying into effect the statute passed in the 3rd and 4th years of the reign of his present Majesty, cap. 74, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance."

And whereas it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution; and it will be convenient that all the orders and regulations made by the Court under the said act should be contained in the same rule.

Now, it is hereby ordered that the said general rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which before the 1st day of March next ensuing shall have been taken pursuant to the direction of the said rules of Michaelmas Term last.

Rules of Michaelmas Term,
3 Will. 4, re-
voked.

And it is hereby further ordered, that, where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before com-

One at least of
the commissioners
before whom
the acknowledgment is

(a) *Ante*, Vol. 3, p. 871.

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taken, not to be
interested, or
concerned as at-
torney, &c.

missioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.

**Examination of
married women.**

And it is further ordered, that, before the commissioners shall receive such acknowledgment, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest; and, where such married woman, in answer to such inquiry, shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but, if it shall appear to them, or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or, if such provision shall not have been actually made before, then the commissioners shall require the terms of the said intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.

**Affidavit to veri-
fy the certif-
cate.**

And it is hereby further ordered that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall [*except in such cases where the acknowledgment*

shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed] be made by some practising attorney or solicitor of one of the Courts at Westminster, or of one of the counties palatine of Lancaster or Durham; and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent [*or, if more than one person join in the affidavit*, that one or more of the deponents] knew the person or persons making such acknowledgment; and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his (deponent's) knowledge or belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit; and that, previously to such acknowledgment being taken, the deponent had inquired of such married woman [*or, if more than one*, of each of such married women] whether she intended to give up her interest in the estate to be passed; and also the answer thereto; and, where such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true: and, where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said Judge [*or Master, or Commissioners.*]

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**Affidavit to state
the parish, &c.
in which the
premises are.**

**Affidavit to be
in form annexed,
p. 120.**

**Certificates to be
delivered to the
proper officer
within one
month.**

Fees.

And it is hereby further ordered that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested, shall by deed be described to be situate.

And it is hereby further ordered that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary; or such affidavit may be made, where it is found convenient, by one of the commissioners, with such variation in the form thereof as shall be necessary in that behalf.

And it is hereby further ordered that the certificates, and affidavits verifying the same, shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the Court or a Judge.

And it is hereby further ordered that the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—

	<i>£ s. d.</i>
To a Judge or Master for taking the acknowledgment of every married woman, of which 7 <i>s.</i> 6 <i>d.</i> will be paid, in the case of a Judge, to his clerk, and the residue thereof will be paid over to the treasury; and, in the case of a Master, the whole will be paid over to the treasury or the fee fund account of the Court of Chancery	1 6 8
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13 <i>s.</i> 4 <i>d.</i> for each commissioner	1 6 8
To each commissioner, when required to go more than one	

	£ s. d.	1834.
mile, but not exceeding three miles, besides his reasonable travelling expenses	1 1 0	
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses	2 2 0	
To the clerk of the peace, or his deputy, for every search ...	0 1 0	
To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of one hundred names	0 5 0	
To the same, for every further complete number of fifty names, an additional	0 2 6	
To the officer, for every search	0 1 0	
To the same, for every official copy of the certificate.....	0 2 6	
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of one hundred names	0 5 0	
To the same, for every further complete number of fifty names additional	0 2 6	
To the same, for preparing every special commission, including a fee of five shillings to the clerk of the Chief Justice or other Judge, for the fiat	0 15 0	
To the same, for examining the certificate and affidavit, and filing and indexing same, as required by the said act of the 3rd and 4th Will. 4, c. 74	0 5 0	

And it is hereby further ordered that the fees and charges to be paid for the entries of deeds required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consent of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls, shall be as follows:—

	£ s. d.
For the indorsements on the deed of the memorandum of production, and memorandum of entry on court rolls, to be	

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signed by the lord steward or deputy steward, each indorsement of memorandum 5s., together	0 10 0	
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of seventy-two words	0 0 6	
For taking the consent of each protection of settlement of lands	0 13 4	
For taking the surrender by each tenant in tail of lands	0 13 4	
For entries of such surrenders, or the memorandums thereof, on the court rolls, at per folio of seventy-two words.....	0 0 6	

Form of affidavit verifying the certificate of acknowledgment taken in pursuance of the act of parliament, to be made by some practising attorney or solicitor, and to be sworn before a Judge of the Court of Common Pleas, or a commissioner appointed for taking affidavits in the said Court.

In the Common Pleas.

A. B., of —, in the — of —, gentleman, one of the attorneys [or solicitors] of the Court of —, maketh oath and saith, that he knows — in the certificate hereunto annexed mentioned; and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the Judge [or Master, or by A. B., of &c., and C. D. of &c., the commissioners in the said certificate mentioned] on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent; and that at the time of making such acknowledgment the said — was of full age and competent understanding; and that the said — knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made: [(a) And this deponent further saith, that, to the

(a) This is to be omitted when the acknowledgment is taken by a Judge or Master.

best of this deponent's knowledge and belief, neither of the said commissioners is [or, the said A. B., or the said C. D., one of the said commissioners, is not] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned]: And this deponent further saith, that, previous to the said — (*the married woman*) making the said acknowledgment, he this deponent inquired of the said — (*the married woman*) [or, if more than one, of each of them the said — and — (*the married women*)] whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates; and that, in answer to such inquiry, the said — (*the married woman*) declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest; of which declaration of the said — (*the married woman*) this deponent has no reason to doubt the truth, and verily believes the same to be true [or, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates: And this deponent lastly saith, that, before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed or writing [or that the terms thereof have been reduced into writing], and that such deed [or writing] has been produced to the said Judge [Master, or Commissioners]: And lastly this deponent saith that it appears by the deed acknowledged by the said — (*the married woman*) that the premises wherein she is stated to be interested are described to be in the parish or place of —

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[or parishes or places of — and —], in the county of — [or counties of — and —, *as the case may be.*]
 Sworn, &c.

N.B.—When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

E. H. ALDERSON.

PRACTICE.

IT IS ORDERED, That, from and after the first day of Easter Term next inclusive, the following rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, and Courts of Error in the Exchequer Chamber.

Pleadings to be delivered.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties—Tidd's Practice, 9th edit. p. 696 (a).

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and, if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea—Tidd, 739.

(a) This and the following references to Tidd shew where the reader will find the practice that

formerly obtained upon the subjects embraced by these rules.

Provided that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way.

3. No rule for joinder in demurrer shall be required; but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment—Tidd, 696.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the Court —Tidd, 717, 718.

6. No motion or rule for a concilium shall be required; but demurrs, as well as all special cases and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a Secondary in the Common Pleas, upon payment of a fee of one shilling; and notice thereof shall be given forthwith by such party to the opposite party—Tidd, 696, 736, 738-9.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; and, in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be

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Other points
not stated may
be argued, on
notice given.
Rule to join in
demurrer, not
required.

Joinder in de-
murrer need
not be signed.

Making up is-
sue or demur-
rer books.

Setting down
special case or
demurrer.

Delivery of pa-
per books.

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heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the Secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies—Tidd, 739.

JUDGMENT RECOVERED.

In a plea of judgment recovered the date of the judgment and number of the roll to be stated in the margin.

8. Where a defendant shall plead a plea of judgment recovered in another Court, he shall in the margin of such plea state the date of such judgment, and, if such judgment shall be in a Court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and, in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge.

ERROR.

Writ of error no supersedeas till service, with points to be argued.

9. No writ of error shall be a supersedeas of execution, until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued—Tidd, 530, et seq.

Execution may issue if point frivolous.

Provided that, if the error stated in such notice shall appear to be frivolous, the Court or a Judge, upon summons, may order execution to issue—Id. Ibid.

No rule to certify or transcribe the record.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the Court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall

be at liberty to sign judgment of non pros. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the clerk of the errors of the Court of Error—Tidd, 1158, et seq.

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11. No rule to allege diminution, nor rule to assign errors, nor scire facias quare executionem non, shall be necessary, in order to compel an assignment of errors; but, within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the Court of Error, or to the signer of the writs in the King's Bench in cases of error to that Court, or within twenty days after the allowance of the writ of error in cases of error coram nobis, or coram vobis, the plaintiff in error shall assign errors; and, on failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros—Tidd, 1164, et seq.

Diminution, as-
signment of er-
rors, sci. fa.
quare execu-
tionem non.

12. The assignment of errors and subsequent pleadings thereon shall be delivered to the attorney of the opposite party, and not filed with any officer of the Court—Tidd, 1168.

Delivery of
pleadings in er-
ror.

13. No scire facias ad audiendum errores shall be necessary (unless in case of a change of parties); but the plaintiff in error may demand a joinder in error, or plead to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound within twenty days after such demand to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed—Tidd, 1172.

No sci. fa. ad
audiendum er-
rores necessary.

Joinder in error
within twenty
days.

Provided, that, if in any case the time allowed as hereinbefore mentioned for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the tenth day of August in any year, the party enti-

Where twenty
days expire after
10th August.

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PRACTICE.

Further time allowed.

Not to apply to errors in fines, &c.

Setting down case for argument.

Delivery of error books.

Proceedings in error not entered before setting down for argument.

tled to such time shall have the like time for the same purpose after the twenty-fourth day of October, without reckoning any of the days before the twelfth [tenth?] of August.

Provided also, that in all cases such time may be extended by a Judge's order.

Provided also, that, in all cases of writs of error to reverse fines and common recoveries, a scire facias to the terre-tenants shall issue as heretofore—Tidd, 1173.

14. When issue in law is joined, either party may set down the case for argument with the clerk of the errors of the Court of Error, or the clerk of the rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a concilium—Tidd, 504-5.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies—Tidd, 1176.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument; but, after judgment shall have been given in the Court of

Error in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the Court below, on a certificate of a clerk of the errors of the Exchequer Chamber of the judgment given, for which a fee of 3s. 4d., and no more, shall be charged—Tidd, 730.

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PRACTICE.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1 Will. 4, s. 12.

Notice of taxa-
tion.

18. It shall not be necessary to repass any Nisi Prius record which shall have been once passed, and upon which the fees of passing shall have been paid; and if it shall be necessary to amend the day of the teste and return of the distringas or habeas corpora, or of the clause of Nisi Prius, the same may be done by the order of a Judge obtained on an application ex parte—Tidd, 776.

Repassing re-
cord.

19. Writs of trial shall be sealed only, and not signed. Writs of trial.

20. Either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and, unless the adverse party shall consent by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a Judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice which shall be proved at the trial to the satisfaction of the Judge or other presiding

Proof of docu-
ments.

1834.
PRACTICE.

officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided, that, if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection ; and, in the absence of a special order, the same shall be costs in the cause.

FORM OF NOTICE REFERRED TO—(A.)

In the King's Bench, }
 Common Pleas, } A. B. v. C. D.
 or Exchequer. }

Take notice that the ^{plaintiff}_{defendant} in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the ^{defendant}_{plaintiff}, his attorney, or agent, at _____, on _____, between the hours of _____ ; and that the ^{defendant}_{plaintiff} will be required to admit that such of the said documents as are specified to be originals were respectively written, signed,

or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

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PRACTICE.

G. H., Attorney for ^{plaintiff.} defendant.

To E. F., Attorney or Agent for ^{defendant.} plaintiff.

[Here describe the documents, the manner of doing which may be as follows]—

Originals.

Description of the Documents.	Date.
Deed of Covenant between A. B. and C. D. 1st part, } and E. F. 2nd part	1st January, 1828
Indenture of Lease from A. B. to C. D.	1st February, 1828
Indenture of Release between A. B. and C. D., 1st part, &c. 2nd February, 1828	
Letter, Defendant to Plaintiff	1st March, 1828
Policy of Insurance on Goods by ship Isabella on Voyage from Oporto to London	3rd December, 1827
Memorandum of Agreement between C. D., Captain of said Ship, and E. F.	1st January, 1828
Bill of Exchange for 100 <i>l.</i> at Three Months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	1st May, 1829

Copies.

Description of Documents.	Date.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of Baptism of A. B. in the Parish of X.	1st January, 1808.	
Letter, Plaintiff to Defendant	1st February, 1828.	{ Sent by General Post, 2nd February, 1828.
Notice to produce Papers	1st March, 1828.	{ Served 2nd March, 1828, on Defendant's Attorney, by E. F. of —
Record of a Judgment of the Court of King's Bench, in an action, J.S. v. J. N.	Trinity Term, 10th Geo. IV.	
Letters Patent of King Charles II, in the Rolls Chapel	1st January, 1680.	

1834.

PLEADING.

Recital of stat.
3 & 4 Will. 4,
c. 42, s. 1.

PLEADING.

WHEREAS it is provided by the statute 3 & 4 Will. 4, c. 42, s. 1, that the Judges of the superior Courts of common law at Westminster, or any eight or more of them, of whom the Chiefs of each of the said Courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them might seem expedient; which rules, orders, and regulations were to be laid before both Houses of Parliament as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both Houses of Parliament, but after that time should be binding and obligatory on the said Courts, and all other Courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament:

Provided, that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force :—

IT IS THEREFORE ORDERED, That, from and after the first day of Easter Term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations made pursuant to the said statute shall be in force.

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FIRST GENERAL RULES AND REGULATIONS.

PLEADING.
Pleadings to be
intituled of the
day and year
when pleaded.

1. Every pleading, as well as the declaration, shall be intituled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

2. No entry of continuances by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the jurata ponitur in respectu, which is to be retained.

Provided, that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea puis darrein continuance is now by law pleadable, in Banc, or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the Court or a Judge shall otherwise order.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year (whether in term or vacation) when signed, and shall not have relation to any other day.

Provided, that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc.

1834.

PLEADING.

Warrants of attorney not to be entered.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. AND WHEREAS, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will before the trial be brought to the notice of the respective parties more distinctly than heretofore; and, by the said act of the 3rd & 4th Will. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged:

Several counts and pleas, where allowed.

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Examples in declarations.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Contract with condition.

Ex. gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for, they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

Non-delivery of bill in payment.

So, counts for not giving or delivering or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

Not accepting and paying for goods.

So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

Bills and notes.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods,

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PLEADING.

money, or otherwise, are to be considered as founded on distinct subject-matters of complaint; for, the debt and the security are different contracts; and such counts are to be allowed.

Two counts upon the same policy of insurance are not Policies. to be allowed.

But, a count upon a policy of insurance, and a count Premium. for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be Charter-parties. allowed.

But, a count for freight upon a charter-party, and for Freight. freight pro rata itineris, upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation Demise, and use of the same land for the same time, are not to be al- and occupation. lowed.

In actions of tort for misfeasance, several counts for the Misfeasance. same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts Nonfeasance. founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass, for acts committed at the Trespass. same time and place, are not to be allowed.

Where several debts are alleged in indebitatus assump- Indebitatus as-
sit to be due in respect of several matters, ex. gr., for sumpsit.
wages, work and labour as a hired servant, work and la-
bour generally, goods sold and delivered, goods bargained
and sold, money lent, money paid, money had and receiv-
ed, and the like, the statement of each debt is to be con-
sidered as amounting to a several count within the mean-
ing of the rule which forbids the use of several counts,
though one promise to pay only is alleged in consideration
of all the debts.

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PLEADING.

Account stated.

Several breach-
es.Instances of
pleas and
avowries, &c.

Payment.

Accord and sa-
tisfaction—Re-
lease.Liability of
third party.Agreement to
forbear in con-
sideration of li-
ability of third
party.Liberum tene-
mentum, easement,
right of way, right of
common, com-
mon of turbary,
and of estovers.

Provided, that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

Ex. gr.—Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed.

Pleas of solvit ad diem, and of solvit post diem, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of A. B., in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed.

But, pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for, they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass quare clausum fregit, pleas of soil and freehold of the defendant in the locus in quo, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

But, pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So, pleas of a right of way over the locus in quo, varying the termini or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But, avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples in this and other places specified are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used in apparent violation of the preceding rules, the opposite party shall be at liberty to apply to a Judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is bona fide intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application, which shall be allowed.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the

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PLEADING.

Right of com-

mon.

Right of way.

Distress for rent,
and damage
feasant.

Distress for rent.

The cases above
mentioned as
instances only.Departure from
these rules, how
taken advantage
of.Costs of counts
and pleas.

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PLEADING.

party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings: and further, in all cases in which an application to a Judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was bona fide intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the Court or Judge before whom the trial is had shall be of opinion that no such distinct subject-matter of complaint was bona fide intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance with respect to which the Judge shall so certify.

Special venue.

8. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Provided, that, in cases where local description is now required, such local description shall be given.

Local description.

**Commencement
and conclusion
of pleas, &c.**

9. In a plea or subsequent pleading intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to

the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of " precludi non," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action; provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.

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PLEADING.

10. No formal defence shall be required in a plea; and ^{Commencement of plea.} it shall commence as follows:—" The said defendant, by _____, his attorney [or, in person, &c.], says that &c.

11. It shall not be necessary to state in a second or ^{Second plea.} other plea or avowry that it is pleaded by leave of the Court, or according to the form of the statute, or to that effect.

12. No protestation shall hereafter be made in any ^{Protestation.} pleading; but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country. ^{Traverses.}

Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial. ^{Opposite party may plead over.}

14. The form of a demurrer shall be as follows:—" The said defendant, by _____, his attorney [or, in person, &c., or plaintiff], says that the declaration [or plea, &c.] is not sufficient in law," shewing the special causes of demurrer, if any. ^{Form of demurrer.}

The form of a joinder in demurrer shall be as follows:— " The said plaintiff [or defendant] says that the declaration [or plea, &c.] is sufficient in law." ^{Joinder in demurrer.}

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PRACTICE.
PLEADING.
Entry of proceedings on record.

Charge for issue.

Payment of money into Court.

15. The entry of proceedings on the record for trial, or on the judgment-roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made or supposed to be made on any roll or record whatever.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the Assizes, or of any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

17. When money is paid into Court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, mutatis mutandis:—

"C. D. } The —— day of ——.
ats. }

A. B. } The defendant, by ——, his attorney [or, in person, &c.], says that the plaintiff ought not further to maintain his action, because the defendant now brings into Court the sum of ——l., ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages [or, in actions of debt, that he is not indebted to the plaintiff] to a greater amount than the said sum &c., in respect of the cause of action in the declaration mentioned; and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action."

No order to pay money into Court except in certain cases.

18. No rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21; but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to

Proceeding by plaintiff after payment of

the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply "that he has sustained damages [or, that the defendant is indebted to him, *as the case may be*] to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

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PRACTICE.
PLEADING.
money into
Court.

Commencement of declaration after
plea of non-joinder.

20. In all cases under the 3 & 4 Will. 4, c. 42, s. 10, in which, after a plea in abatement of the nonjoinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

"[Venue.]—A. B., by E. F., his attorney, [or, in his own proper person &c.], complains of C. D. and G. H., who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H., &c." [The same form to be used mutatis mutandis in cases of arrest or detainer.]

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

Character of
assignees, &c.,
to be taken as
admitted, unless
specially de-
nied.

1834.

PLEADING.Effect of non
assumpsit.

Warranty.

Policy.

Carriers and
bailees.

Agents.

Goods sold.

Money had and
received.In actions on
bills and notes,
general issue not
admissible.

PLEADINGS IN PARTICULAR ACTIONS.

I.—*Assumpsit.*

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr.—In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged; but not of the breach.

In an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; ex. gr. the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; ex. gr. infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

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In assumpsit, matters in confession and avoidance to be pleaded specially.

4. In actions on policies of assurance the interest of the assured may be averred thus:—"That A., B., C., and D., or some or one of them, were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit and on the account of the person or persons so interested."

Statement of
interest of as-
sured.

II.—*In Covenant and Debt.*

1. In debt on specialty, or covenant, the plea of non est factum shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

Non est factum.

2. The plea of "nil debet" shall not be allowed in any action.

Nil debet.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of assumpsit.

General issue in
debt.Matters in con-
fession and
avoidance.

4. In other actions of debt, in which the plea of nil debet has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall

Pleas in other
actions.

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deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

III.—*Detinue.*

Non detinet.

The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

IV.—*In Case.*

Effect of not guilty.

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Other pleas.

Ex. gr. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

Right of way.

In an action on the case for obstructing a right of way such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

Trover.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

Slander.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

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PLEADING.
Escape.
Carriers.

Matters in con-
fession and
avoidance.

V.—*In Trespass.*

1. In actions of trespass quare clausum fregit, the close or place in which &c. must be designated in the declaration by name or abuttals, or other description; in failure whereof the defendant may demur specially.

Abuttals in de-
claration.

2. In actions of trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

Effect of plea of
not guilty in
trespass quare
clausum fregit.

3. In actions of trespass de bonis asportatis, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

In trespass de
bonis asporta-
tis.

4. Where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified.

Right of way.

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PLEADING.
Common of
pasture.

Similar pleas.

Commencement
of the
rules.

5. And where, in an action of trespass quare clausum fregit, the defendant pleads a right of common of pasture for divers kinds of cattle, ex. gr. horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

PROVIDED NEVERTHELESS, that nothing contained in the 5th, 6th, or 7th of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of Easter Term next.

FORMS OF ISSUES, &c.

Issues, judgments, and other proceedings in actions commenced by process under 2 Will. 4, c. 39, shall be in the several forms in the schedule hereunto annexed, or to the like effect, mutatis mutandis: Provided, that, in case of non-compliance, the Court or a Judge may give leave to amend.

No. 1.
Form of an issue in the King's Bench, Common Pleas, or Exchequer.

In the King's Bench, *or*,
In the Common Pleas, *or*,
In the Exchequer.

The [date of declaration] day of ——, in the year of our Lord 18—.

[Venue.]—A. B., by E. F., his attorney, [*or*, in his own proper person, *or*, by E. F., who is admitted by the Court

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FORMS OF IS-
SUES, &c.

here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., *as the case may be*], complains of C. D., who has been summoned to answer the said A. B. [or, arrested or detained in custody by virtue, or, served with a copy, *as the case may be*, of a writ issued on (*date of first writ*) the — day of —, in the year of our lord 18—, out of the Court of our lord the king before the king himself at Westminster, or, out of the Court of our lord the king before his Justices at Westminster, or, out of the Court of our lord the king before the Barons of his Exchequer at Westminster, *as the case may be*]; For that [*Copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.*]

Thereupon the sheriff is commanded that he cause to come here on the — day of —, twelve &c., by whom &c., and who neither &c., to recognise &c., because as well &c.

[*The placita are to be omitted.—Copy the issue to the end of the award of the venire, and proceed as follows:*]

Afterwards, on the [*teste of distringas or habeas corpora*] — day of —, in the year —, the jury between the parties aforesaid is respited here until the [*return day of distringas or habeas corpora*] — day of —, unless — shall first come on the [*first day of Sittings, or commission day of Assizes*] — day of —, at —, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the said jurors accordingly. [*The postea is to be in the usual form.*]

[*Copy the issue to the end of the award of the venire, and proceed as follows:*]

Afterwards, the jury between the parties is respited until the [*return of distringas or habeas corpora*] —

No. 2.
Form of Nisi
Prius record in
the King's
Bench, Common
Pleas, or Ex-
chequer.

No. 3.
Form of judg-
ment for the
plaintiff in as-
sumpsit.

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day of —, unless — shall first come on the [*day of Sittings or Nisi Prius*] — day of —, at —, according to the form of the statute in that case made and provided, for default of the jurors, because none of them did appear.

Afterwards, on the [*day of signing final judgment*] — day of —, came the parties aforesaid, by their respective attorneys aforesaid [*or as the case may be*]; and —, before whom the said issue was tried, hath sent hither his record had before him, in these words: [*Copy postea.*]

Therefore, it is considered that the said A. B. do recover against the said C. D. his said damages, costs, and charges, by the jurors aforesaid in form aforesaid assessed; and also ——l. for his costs and charges by the Court here adjudged of increase to the said A. B., with his assent; which said damages, costs, and charges in the whole amount to ——l.: and the said C. D. in mercy &c.

No. 4.
 Form of the is-
 sue when it is
 directed to be
 tried by the
 sheriff.

[*After the joinder of issue, proceed as follows:*]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20l., hereupon, on the [*testie of writ of trial*] — day of —, in the year —, pursuant to the statute in that case made and provided, the sheriff [*or, the Judge (a) of*] —, being a Court of record for the recovery of debt in the said county, *as the case may be*,] is commanded that he summon twelve &c., who neither &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly; and, when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our lord the king to him in that behalf directed, with the finding of the jury thereon indorsed, on the —— day of —, &c.

(a) See *Clark v. Marner*, post, p. 171.

William the Fourth, by &c., to the sheriff of our county
of — [or, to the Judge of —, being a Court of
record for the recovery of debt in our county of
—, *as the case may be*].

Whereas A. B., in our Court before us at Westminster
[or, in our Court before our Justices at Westminster, or,
in our Court before the Barons of our Exchequer at West-
minster, *as the case may be*], on the [*date of first writ of
summons*] — day of — last, impleaded C. D. in an ac-
tion on promises [or *as the case may be*]: For that where-
as one, &c. [*here recite the declaration as in a writ of in-
quiry*]; and thereupon he brought suit: And whereas the
defendant, on the — day of — last, by —, his at-
torney [or *as the case may be*], came into our said Court
and said [*here recite the pleas and pleadings to the join-
der of issue*]; and the plaintiff did the like: And whereas
the sum sought to be recovered in the said action, and indor-
sed on the writ of summons therein, does not exceed
20*l.*; and it is fitting that the issue above joined should be
tried before you the said sheriff of — [or, Judge, *as
the case may be*]: We therefore, pursuant to the statute
in such case made and provided, command you that you do
summon twelve free and lawful men of your county, duly
qualified according to law, who are in nowise akin to the
plaintiff or to the defendant, who shall be sworn truly to
try the said issue joined between the parties aforesaid, and
that you proceed to try such issue accordingly; and, when
the same shall have been tried in manner aforesaid, we
command you that you make known to us at Westminster
[or, to our Justices at Westminster, or, to the Barons of
our said Exchequer, *as the case may be*,] what shall have
been done by virtue of this writ, with the finding of the
jury hereon indorsed, on the — day of — next.
Witness —, at Westminster, the — day of —, in
the — year of our reign.

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 FORMS OF IS-
SUES, &c.
 No. 5.
 Form of writ of
trial.

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FORMS OF IS-
SUES, &c.

No. 6

Form of indorse-
ment thereon of
the verdict.

Afterwards, on the [*day of trial*] — day of —, in the year —, before me, sheriff of the county of — [or, Judge of the Court of —], came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within named [or as the case may be]; and the jurors of the jury by me duly summoned, as within commanded, also came, and, being duly sworn to try the said issue within mentioned, on their oath said that &c.

No. 7.

Form of indorse-
ment thereon,
in case a non-
suit takes place.

[*After the words "duly sworn to try the issue within mentioned," proceed as follows:*]

And were ready to give their verdict in that behalf; but the said A. B., being solemnly called, came not, nor did he further prosecute his said suit against the said C. D.

No. 8.

Form of judg-
ment for the
plaintiff after
trial by the
sheriff.

[*Copy the issue, and then proceed as follows:*]

Afterwards, on the [*day of signing judgment*] — day of —, in the year —, came the parties aforesaid, by their respective attorneys aforesaid [or as the case may be], and the said sheriff [or, Judge, as the case may be] before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon; which said indorsement is in these words, to wit: [*Copy the Indorsement.*]

Therefore it is considered, &c., [*in the same form as before*].

In the Common Pleas.

HILARY TERM, 4 WILL. IV.

KING and KING v. SHRIVES.

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THE following case was sent by his Honor, the Vice-Chancellor, for the opinion of the Judges of this Court:—

William King being seised of a certain freehold farm and estate in Bedfordshire, occupied by himself, by his last will and testament, bearing date the 15th January, 1823, and signed and attested as by law is required to pass freehold estates, gave and bequeathed to his brothers, James King and John King, all his goods, chattels, *estate*, and effects, of what nature, sort, kind, quantity, or quality soever and wheresoever (not thereby otherwise disposed of), *upon trust* to and for the uses, intents, and purposes thereafter mentioned; viz. first, that *all his just debts*, funeral expenses, &c., &c., should be fully paid and discharged, and that whatsoever remained after such discharge, *of his personal effects*, should be appropriated to the use, interest, and benefit of his family then residing with him, that is to say, his wife Helena, and eight sons

w. K. being
seised of a free-
hold farm and
estate in his own
occupation, by
his will gave and
bequeathed to
his two brothers
all his goods,
chattels, *estate*,
and effects, of
what nature or
quality soever,
and wheresoever
(not thereby
otherwise dis-
posed of), upon
trust, first, that
all the testator's
debts should be
paid and satis-
fied, and that
whatsoever re-
mained after
such discharge,
*of his personal
effects*, should be
appropriated to
the use of his
family; second-

ly, that testator's family should be placed in the farm until his youngest son should attain the age of twenty-one; and lastly, that, on his attaining that age, the estate should be sold, and the produce divided among the testator's family; and he appointed his brothers his executors. The testator being seised of a freehold estate, independently of the farm he occupied, and his personal effects being insufficient to satisfy his debts:—*Held*, that his executors were entitled to sell such freehold estate for the payment of his debts.

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conjointly, in such way and manner as should, in the discretion of the executors, appear most proper: secondly, he willed and appointed that his family then residing with him as aforesaid should be placed in the farm, his own estate, and then occupied by him, to occupy and manage it for their mutual advantage until his youngest son, then about fifteen years old, should arrive at the age of twenty-one years; yet, nevertheless, under the direction and control of the said James King and John King, who should have the power to interfere in case any difference or misunderstanding should arise between them, to use their best endeavours to reconcile such difference, or rectify such misunderstanding, to secure peace and harmony amongst them; and, if that object could not otherwise be effected, he willed and desired them to exercise the discretionary power he had therein given them, by making such regulation and even separations among them as might appear to be necessary for that important purpose. Furthermore, thirdly, at the period above alluded to, namely, when his youngest son should have attained the age of twenty-one years, he willed and appointed that his said estate should be disposed of or sold, and that the produce thereof should be divided into three equal parts, and that two of those parts should be divided equally between all his children, nine in number, share and share alike, and that the one remaining third part should be placed at interest, on good security, for the benefit of his widow, during the term of her natural life, or so long as she should continue his widow; and, at her decease, or in case of a second marriage, that the said third part appropriated to her use during her natural life, should likewise be called in and divided amongst his surviving children in like manner as the other two third parts, share and share alike: And he thereby nominated, constituted, and appointed the above-named James King and John King executors of his will.

The testator died in February, 1825, without revoking or altering his said will; and at the time of his decease he was seized in fee of the said freehold farm and estate in the county of Bedford which was occupied by himself, and of one other freehold estate, the latter of which was at the time of his death subject to a mortgage term created by him for securing the sum of 300*l.* and interest, which principal sum, together with some arrears of interest, remained still due and owing. The testator left his wife and eight sons him surviving, and the youngest son was then of the age of sixteen years. James King and John King, the above named executors, survived the testator, and proved his will. Besides the said mortgage debt, the testator at the time of his death was indebted to divers persons in various debts by simple contract, which he left no personal estate to satisfy. James King and John King (the trustees and executors) had therefore, since the death of the testator, entered into a contract with William Shrives (the defendant) to sell him the said last-mentioned freehold estate, for discharging the mortgage, and for payment of the debts of the testator.

The question for the opinion of the Court was, whether, under the will of the testator, the said James King and John King, the trustees and executors therein named, were now entitled to sell and convey the said last-mentioned freehold estate to the defendant Shrives, for the payment of the testator's debts.

The case came on for argument in the last Trinity Term.

Mr. Serjeant *Wilde*, for the plaintiffs.—The plaintiffs, as devisees and executors, were under the testator's will authorized to sell and convey the freehold estate in question to the defendant Shrives, for the payment of the testator's debts. Two questions arise here—first, whether the freehold in the property in question passed to the plaintiffs under the devise of the testator's *estate*—

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and secondly, if it did, whether they were entitled to sell such estate, it being charged with the payment of the testator's debts.—First—Although the word “estate,” when used in a will, may receive different significations, yet the Court will construe it according to the intention of the testator; and here, on looking at the general words with which it is accompanied, namely, all the testator's goods, chattels, and effects, of what nature, sort, or quality soever and wheresoever, it is clear that he meant that the whole of his property should pass to the trustees and executors named in his will, and that he did not intend to die intestate as to any part of it; his main object being, that no portion of his family should be left unprovided for. The testator devised all his estate to his two brothers, upon trust, first, for the payment of his debts, and that the remainder should be appropriated to the use and benefit of his family; secondly, that his family then residing with him should be placed in the farm then occupied by him. By whom? By the trustees, who were to have the control, and direct the management of the farm till the testator's youngest son should attain the age of twenty-one. And, lastly, that, on his said son's attaining that age, the estate should be sold, and the produce divided among all his children. Although the devise was of all the testator's estate and effects (not otherwise disposed of by his will), yet the whole of his property was declared to be subject to the uses thereafter mentioned, namely, the payment of debts, the management of the farm then in the occupation of the testator, and the ultimate disposal of it by the executors. Looking, therefore, at the position of the word “estate” in this will, and the uses to which the whole of the property was to be appropriated, it is clear the freehold in the estate in question was intended to pass to the plaintiffs, particularly as no indication of a contrary intention is to be found in the will. In *Terrel*

v. *Page* (a), the testator gave all the rest and residue of his money, goods, and chattels, and *other* estate whatsoever, to a devisee whom he named and appointed his executor; and in *Tilley v. Simpson* (b) there was a like bequest, omitting the word *other*; and it was held sufficient to pass a real estate. In *Smith v. Coffin* (c), where a testator devised all the rest of his goods, chattels, rights, credits, personal and testamentary estate to B., for his own use and disposal; it was held that he took an estate in fee in the testator's *Lands*. In *Doe d. Andrew v. Lainchbury* (d), a devise of all the residue of the testator's money, stock, *property, and effects*, was held to pass *real* as well as personal estate, it appearing from other parts of the will that the testator had applied those words to real estate. In *Doe d. Wall v. Langlands* (e), it was decided that the word *property*, although followed by *goods and chattels*, was sufficient of itself to carry the realty; the personalty not being sufficient to discharge all the testator's debts and legacies. In *Sharp v. Sharp* (f), where the testator bequeathed the whole of his remaining property to his widow, *with all right and title to the same*, it was held that she took an estate in fee in the freehold: and here, as there was a general disposition of all the testator's property, the word "estate" is not to be restrained to the personal estate, though found in connection with other words referring to such estate. In *Jongama v. Jongama* (g), the testator gave to his executors "all his goods, estates, bonds, and debts, to be sold, &c.," and it was held that the word *estates*, although in connection with those of goods, bonds, &c., was sufficient to pass a copyhold estate surrendered to the uses of the will. Here, the words "of what nature, sort, kind, quantity, or quality soever, and wheresoever," embrace property of every pos-

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(a) 1 Chan. Cas. 262.

(b) 2 Term Rep. 659, n.

(c) 2 Hen. Bl. 444.

(d) 11 East, 290.

(e) 14 East, 370.

(f) 6 Bing. 630; S. C. 4 Moore

& Payne, 445.

(g) 1 Cox's Cas. Eq. 362.

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sible description; and the estate not otherwise disposed of by the will, is the farm in the occupation of the testator, which was to be subject to the control of and ultimately sold by the trustees and executors, for the general benefit of the testator's family. Assuming, therefore, on the authority of the decided cases, that the freehold in the estate in question passed to the plaintiffs under the will, the second question is, whether they are empowered to sell it for the payment of the testator's debts. The Court will raise every reasonable intendment in favour of such a power. In *Kidney v. Coussmaker* (*a*), where land was devised to be sold, the money produced by the sale was held to be chargeable with simple contract debts, upon the implied intention of the testator that his debts should be paid out of his real estate. Here, however, the testator has expressly directed that all his debts should be first paid, which is an express declaration that he meant to charge the whole of his property with the payment of debts. In *Shallcross v. Finden*, where the testator devised his freehold estate, after payment of all his debts, the Master of the Rolls said (*b*): "After payment of his debts, means, that until his debts are paid he gives nothing; that every thing he has shall be subject to his debts. To give those words any effect, they must charge the real estate." In *Williams v. Chitty*, the Lord Chancellor said (*c*): "If the testator talks about debts in the beginning of his will, the real estate must be charged." In *Legh v. Lord War-rington* (*d*), the general rule was established, that, where there is a desire that the debts shall be paid, and the real estate is devised, such estate is subject to the debts, in case of a deficiency of personal assets. And that principle was adopted in the late case of *Clifford v. Lewis* (*e*), where the testator in the introductory part of his will, having "willed and directed that his just

(*a*) 1 Ves. 436; S. C. 2 Ves.
267.

(*b*) 3 Ves. 738.

(*c*) 3 Ves. 552.
(*d*) 4 Brown's Parl. Cas. 90.
(*e*) 6 Mad. & Geld. 33.

debts, &c., should be paid and satisfied," it was held to amount to a charge of the debts upon the real estate. In *Kightley v. Kightley*, the Master of the Rolls said (*a*): "Wherever a man makes a will, he is supposed to do that which conscience obliges him to do; and if he shews an intention that his debts shall take place of every other disposition, and that he meant they should be paid, the Court will strictly enforce that intention." In *Keeling v. Brown* (*b*), there was no charge upon the real estate for payment of debts, and the testator's personal estate was sufficient for that purpose. In *Powell v. Robins* (*c*), all the testator's real estate was specifically devised to his son, and no part of it passed to the executors. In *Spong v. Spong* (*d*), and in *Hennell v. Whittaker* (*e*), where the cases of *Finch v. Hattersley* (*f*) and *Brydges v. Landen* (*g*) were referred to, and the facts ascertained, by the direction of the Master of the Rolls, the principle was established, that, in case a testator's personal estate is not sufficient for the payment of his debts, the deficiency must be made good out of his real estate; and that, where he directs his debts to be paid by his executor, it is a condition imposed upon the executor to satisfy the testator's debts as far as all the property which he derives under that testamentary disposition will extend, whether real or personal. As, therefore, by the general words of the devise, the whole of the testator's estate passed to the trustees, subject in the first place to and chargeable with the payment of all his debts, and as his personal estate was insufficient for that purpose, the plaintiffs are empowered to sell and convey the estate in question to the defendant, to enable them to discharge such debts.

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Mr. Serjeant *Merewether*, contra.—The testator's real estate did not pass to the plaintiffs as trustees under the

(*a*) 2 Ves. 331.

(*e*) 3 Russell, 348.

(*b*) 5 Ves. 359.

(*f*) 7 Ves. 211, n.

(*c*) 7 Ves. 209.

(*g*) 3 Ves. 550, n.

(*d*) 3 Bligh, New Series, 84.

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will; and, even if it did, they acquired no power to sell the estate in question for the payment of the testator's debts. Both must concur to enable them to make a good title to the defendant as purchaser. Admitting that the word *estate* is sufficient to pass the realty if it stands alone in a will, yet here it must be taken in connection with those words with which it is associated; and the words "goods and chattels," which immediately precede, and "effects," which follows it, emphatically apply to personal estate alone. *Spong v. Spong*, and that class of cases referred to for the plaintiffs, were decided on particular expressions found in the will; and the word "estate" may be extended or restrained by the context; for instance, if it be the last word used, as in *Terrel v. Page* and *Tilley v. Simpson*, or previous words be adopted which may refer to the realty. In *Smith v. Coffin*, the word "testamentary" was joined with the word "personal," and was therefore held to extend the meaning of the latter. Although here the general words "of what nature or quality soever" follow, yet they can be only taken to apply to words *ejusdem generis* which immediately precede them, namely, goods, chattels, and effects. In *Doe d. Hick v. Dring* (a), a devise of all and singular the testator's effects, of what nature or kind soever, was held not to pass his real estate, unless it could be collected from the will itself that it was the testator's intention that it should pass; and here no such intention was expressed or can even be implied. Mr. Justice Bayley in that case said: "We must be satisfied that it was the intention of the testator to pass his real property; the probability is, indeed, in almost all cases, that the testator means to pass the whole of his property; but that is not enough, unless he use words to shew clearly that he so intends." The case of *Doe d. Hurrell v. Hurrell* (b) bears the nearest resemblance to

(a) 2 Mau. & Selw. 448.

(b) 5 Barn. & Ald. 18.

the present. There, a testator, having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust that they should, out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession, for the remainder of his term therein, for the joint advantage of certain of his sons and daughters whom he named in the will; and, at the expiration of the said term, upon further trust to sell and dispose of such residue of his estate and effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: and it was held that the testator's real estate did not pass by the will. There, too, the devise was to the trustees and their executors: whilst here the devise was to the testator's brothers generally, without any words to give them an estate of inheritance, and they were only named as executors at the foot of the will. In *Doe d. Spearing v. Buckner* (a), it was held that a freehold house did not pass by the will, although there were general words in the introductory clause, as to all the testator's estate and effects *both real and personal*. Here, the testator gives and bequeaths, for the payment of his debts, all his goods, chattels, estate, and effects, not otherwise disposed of; he therefore meant to limit that bequest to his personal estate, as his freehold or real estate is disposed of by the subsequent parts of the will. Besides, he directs, in the first place, that whatsoever remained after the discharge of his debts, *of his personal effects*, should be appropriated to the use of his family, thereby indicating the plainest intent possible that his debts should be discharged out of

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(a) 6 Term Rep. 610.

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his *personal effects* exclusively; and if his executors can be deemed to have authority to sell his real estate for discharging his debts, his direction that the farm should be managed for the mutual advantage of his family till his youngest son should attain twenty-one, when it was to be sold, and the produce divided among his children, would be altogether defeated. In all the cases which have been referred to as establishing the position, that, wherever a testator directs his debts to be paid by trustees or executors out of his estate, it creates a charge on his real estate, particularly where the whole of his property is devised to the same persons, there has been some intention manifested by the testator to charge his real estate, whilst here there is not only an absence of such intent, but an express direction to the contrary. As, therefore, the testator's principal object was that his family should continue in the occupation of the estate until his youngest son should become of age, when it was to be sold, and the debts were directed to be paid out of his personal effects, the plaintiffs, as his trustees and executors, have no power to sell or convey the estate in question for the immediate payment of the testator's debts.

Mr. Serjeant *Wilde*, in reply.—The estate in question not being in the occupation of the testator at the time of his death, and which alone is referred to in the two last clauses of the will, the plaintiffs, as his executors, are entitled to sell it for the payment of the testator's debts, without defeating any intention expressed by him; his primary object being the discharge of all his just debts. The Court will not look at the locality of the word "estate," or the words with which it is associated, as the testator devised all his estate in the most general terms possible, namely, "of what nature, kind, quantity, or quality soever," which was sufficient to pass the estate in question. In *Doe d. Hick v. Dring* the question turned on

what would pass under the word *effects*, which stood denuded and alone, without any context to shew that the testator meant that it should apply to his real estate. So, the case of *Doe d. Hurrell v. Hurrell* does not apply; for, Lord Chief Justice Abbott there said (*a*): "The nature of the trusts clearly shews that the testator meant to bequeath his personal property only; for, the trustees are directed out of such *residue* of the monies and effects to manage the farm for the remainder of his term. Now, the real estate was not applicable to such a purpose; for, the trustees at all events had no power to sell any part of the estate bequeathed to them until the end of the term." Here, the two latter trusts in the will were subsiliary to the first; and, where the main and primary object expressed by a testator is the discharge or payment of his debts, and he devises the whole of his estate and effects to trustees, whom he appoints to carry all the trusts in the will into effect, it is sufficient to pass his real estate, which may be sold or conveyed by them for payment of his debts, in case the personal effects shall be insufficient for that purpose; and the case of *Shallcross v. Finden* has established the general principle, that, where a testator in the first place directs all his debts to be paid, it is a charge upon his real estate, and overrides every other disposition either as against his heir-at-law or devisee. Here the testator might and probably did anticipate a surplus of personal property, and the words "after such discharge," may be read as if inserted in a parenthesis, or be considered as if the personal effects should turn out to be more than sufficient to discharge the debts.

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Cur. adv. vult.

The following certificate was afterwards sent to the Vice Chancellor:—

"We have heard this case argued by counsel, and have

(*a*) 5 Barn. & Ald. 21.

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considered it, and we are of opinion, that, under the will of the testator therein mentioned, James King and John King are now entitled to sell and convey the said freehold estate to the said William Shrives, for the payment of the said testator's debts.

“ N. C. TINDAL.

“ J. A. PARK.

“ S. GASELEE.

“ J. B. BOSANQUET.”

*Friday,
Jan. 17th.*

All deputies and officers employed by the Postmaster General are, by the letters patent under which the Postmaster General is appointed and the 2nd section of the statute 6 Geo. 4, c. 50, exempted from serving on juries.

Ex parte ATKINSON.

HIS Grace the Duke of Richmond was appointed Postmaster General, by letters patent under the Great Seal, bearing date the 4th April, 1831; which letters patent contain the following clause:—

“ And, to the intent that the said Charles, Duke of Richmond, and all deputies, officers, and servants by him appointed or to be appointed, may be better enabled to attend the execution of their said several trusts and employments, and may not be withdrawn therefrom, we do declare our will and pleasure to be, that the said Charles, Duke of Richmond, and *all deputies and officers to be by him appointed* as aforesaid, shall not be compelled or compellable to serve on any jury or inquest, or to appear or serve at any Assize or Session, or to bear any public office or employment either ecclesiastical, civil, or military.”

By the 6 Geo. 4, c. 50, intituled ‘An act for consolidating and amending the laws relative to jurors and juries,’ certain persons are (section 1) declared to be qualified and liable to serve on juries for the trial of all issues joined in any of the king's Courts of record at Westminster, &c.: and the second section contains a proviso—“ That all per-

sons exempt from serving upon juries in any of the Courts aforesaid by virtue of any prescription, charter, grant, or writ, shall continue to have and enjoy such exemption in as ample a manner as before the passing of the act, and shall not be inserted in the lists thereinafter mentioned."

Mr. Atkinson was a clerk in the Letter Bill Office, appointed by and employed under the Postmaster General; and his public duties required his daily attendance at the Post Office from 10 o'clock in the morning till a late hour in the afternoon. He had been summoned to attend as a juror at the Sittings of this Court, at Westminster, during the present term.

Mr. Serjeant *Wilde* on a former day, on the part of Mr. Atkinson, applied that he might be discharged from attending pursuant to the above-mentioned summons.—He submitted that the question whether officers serving under the Postmaster General were liable to serve on juries was one of considerable consequence, inasmuch as there are many hundred persons so employed in different parts of the kingdom, who could not, without occasioning serious inconvenience and embarrassment to the public service, absent themselves from their official duties to serve on juries: and he mentioned the case of Mr. Burfield, a receiver of general post letters in the Strand, who, being summoned in November, 1832, to serve as a juror in the Court of King's Bench, attended and claimed to be exempt; and, the letters under which the Postmaster General was appointed being produced, Mr. Justice Littledale, on reading the clause above set forth, declared Mr. Burfield to be entitled to the exemption.

Lord Chief Justice *TINDAL* now said, that, the question being one of great general importance, and likely to occur frequently, he had deemed it expedient to set it at rest by consulting all the Judges upon it; and that, on reading the

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letters patent under which the appointment of Postmaster General was made, and the clause of exemption contained in the jury act, the Judges were unanimously of opinion that the case fell within the words of the exemption.

*Tuesday,
Jan. 14th.*

The defendant and one M. N. gave the plaintiff their joint and several promissory note to secure a separate debt due from each of them. The plaintiff afterwards executed a deed of release to M. N.: —Held, that, although this release discharged both as to the note, it did not enure to the discharge of the separate debt of the defendant, but that the plaintiff might recover that upon an account stated.

COCKS v. NASH.

THIS was an action of assumpsit. The declaration contained a count on a bond given by the defendant (as surety) jointly with one Mary Nash, the defendant's mother, a count upon the joint and several promissory note of the defendant and Mary Nash, for the sum of 100*l.* and interest, and a count upon an account stated between the plaintiff and defendant. To the count on the bond, the defendant pleaded a release given to Mary Nash by the plaintiff and divers other creditors of the defendant, which release, it was contended, enured to the discharge of the defendant as surety: to this plea there was a special replication and a demurrer, which demurrer was subsequently allowed (*a*). Before the demurrer came on for argument the cause went down to trial upon the other issues, at the Salop Summer Assizes, 1832, when Mr. James Hammond, a solicitor, in whose custody the release in question was, was subpoenaed on the part of the defendant, and required to produce the release. He objected to produce it, urging that the defendant was no party to it, and that he held it as trustee for the creditors of Mrs. Nash, who had given him no authority for that purpose. Mr. Baron Gurney, before whom the trial was had, told the witness he was not bound to produce the deed. The plaintiff accordingly obtained a verdict.

(*a*) *Ante*, Vol. 2, p. 434.

In Michaelmas Term, 1832, the defendant obtained a rule nisi for a new trial on the ground of surprise, upon an affidavit stating that Mr. Hammond had before the trial given the defendant's attorney to understand that the deed would be produced by him on that occasion. This rule having in Hilary Term following been made absolute, the defendant obtained a rule calling on the plaintiff and Mr. Hammond to shew cause why the release should not be produced on the new trial, or why a copy thereof should not be furnished to the defendant, and be good evidence. This rule was in Easter Term discharged with costs (a), on the ground that the defendant was no party to the deed.

The cause again came on for trial before the same learned Baron, at the last Summer Assizes for the county of Salop, when Mr. Hammond being put into the witness box, and being called on by the defendant to produce the release, refused to do so, on the grounds before stated. The defendant thereupon offered as secondary evidence a copy of the operative part of the release, which had been furnished to the defendant's attorney by Mr. Hammond a considerable time before the first trial. This evidence was objected to on the part of the plaintiff, but admitted by the learned Baron. It appeared that, by the deed in question, the plaintiff and other creditors of Mrs. Mary Nash, in consideration of a composition of seven shillings in the pound upon the amount of their respective debts (which composition was duly paid), released her from all claims; and, amongst others, the release embraced the note which was the subject of this action. Upon the whole evidence it appeared that the note had been given to secure as well a debt of 41*l.* 17*s.* 6*d.* due from the defendant alone, as the debt of Mary Nash.

The learned Baron told the jury, that, if the note was

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(a) *Ante*, Vol. 3, p. 164.

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given to secure in part a debt due from the defendant himself as principal, and not as a mere surety, he could not set up the deed as a bar to the plaintiff's right to recover. The jury returned a verdict for the plaintiff for 85*l.*, the whole principal and interest due on the note, minus the composition of seven shillings in the pound that had been previously paid thereon.

Mr. Serjeant *Talfoourd*, in Michaelmas Term last, obtained a rule nisi that this second verdict might be set aside, and another trial had, on the ground of misdirection.

Mr. Serjeant *Wilde* and Mr. Serjeant *Ludlow*, contra, now submitted, that, although the authorities tended to shew that the release of one of two makers of a *joint and several* promissory note enured to the discharge of both, yet that, inasmuch as the giving of the note did not in any respect alter the nature and character of the original debt, the note being by the release annulled, the plaintiff was at liberty to resort to the consideration, and was therefore entitled to recover under the count upon an account stated that portion of it which was the sole and separate debt of the defendant.

The verdict was ultimately directed to stand for the plaintiff for 41*l.* 17*s.* 6*d.* upon the account stated, and for the defendant upon the count on the note.

Rule accordingly (a)

(a) See *Dean v. Newhall*, 8 Term Rep. 168.

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FREEMAN *v.* PAGANINI.*Tuesday,
Jan. 14th.*

MONEY having been paid into Court by the defendant in this action in lieu of special bail, and the plaintiff having recovered a verdict—

Where money has been paid into Court in lieu of bail, the plaintiff on moving to have it paid out to him is entitled to the costs of the application.

Mr. Serjeant *Wilde* on a former day moved that it might be paid out, and that the defendant might be ordered to pay the costs of the application. The Court inclined to think that the plaintiff was not entitled to costs. But Mr. Serjeant *Wilde* having on this day referred to Chapman's Practice (*a*), where it is stated that the costs of the application are in such cases allowed in the King's Bench—

Lord Chief Justice TINDAL admitted that such course was the more consonant with the justice of the case, and (the rest of the Court concurring) the rule was granted with costs.

Rule accordingly.

(*a*) Chapman, p. 137.

DOE *d.* TUCKER *v.* ROE.*Wednesday,
Jan. 15th.*

MR. Serjeant *Bompas*, on the part of the lessor of the plaintiff, moved that the service of the declaration and notice in this case might be deemed good service. It had been made the day before the commencement of term, upon the foreman of the tenant in possession on the premises; and on the next day the person by whom the service was made saw the wife of the tenant, who admitted that the declaration, &c., had been received by her, and stated that she had communicated them to her husband.

A declaration and notice in ejectment were served upon a servant of the tenant, whose wife subsequently admitted that she had received it and had given it to her husband:— Held, insufficient.

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Lord Chief Justice TINDAL.—That only amounts to an admission by the wife, which cannot affect her husband.

Mr. Justice ALDERSON.—The wife is not the agent of her husband for the purpose of making admissions.

The rest of the Court concurring—

Rule refused (a).

(a) See *Doe d. Thomas v. Roe*, ante, Vol. I., p. 435. But see *Doe d. James v. Roe*, Id. 597

*Thursday,
Jan. 16th.*

The plaintiff had been employed as secretary to a charitable institution. His appointment was made in pursuance of a resolution of the committee for managing the affairs of the society, which was entered in a book remaining in the hands of the plaintiff as secretary; but to which entry the plaintiff was no party, nor did it appear to have been expressly brought to his notice. The society dissolving, the plaintiff quitted the em-

WHITFORD *v.* TUTIN and Others.

THIS was an action of assumpsit brought by the plaintiff against three of the members of a committee of a charitable society called The British and Foreign Seamen and Soldiers' Friend Society, for the recovery of certain arrears of salary alleged to be due from the committee to the plaintiff as their secretary.

At the trial before Lord Chief Justice Tindal, at the Sittings at Westminster after the last term, it appeared that a resolution had been entered into by the committee to hire the plaintiff as their secretary, which resolution was accordingly inserted in the minute book of the committee; that, in pursuance of this resolution, the plaintiff accepted the office of secretary, in which capacity the book containing the minute of his appointment came into his hands, but it did not appear that he had in any other way notice of such entry; that the secretary resided in the house in which the

employ, leaving this book in the office. In an action against three of the committee for arrears of salary:—Held, that the plaintiff was bound to produce the book, inasmuch as it would shew the terms on which he had been engaged; and that a notice to the defendants to produce it, was not sufficient to entitle him to give secondary evidence under the quantum meruit—the book appearing not to be in the possession of the defendants, but in that of another member of the committee, without the knowledge or control of the defendants.

office of the society was, and that the book was kept there; that, on the subsequent breaking up of the society, the secretary quitted the house, leaving the book in the office; and that the book was taken out of the office by one of the committee named Coleman, who was not made a defendant in this action; but it did not appear that the defendants knew that the book was in the possession of Coleman.

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The plaintiff having proved his services as secretary, it was objected on the part of the defendants that the plaintiff's case could not be made out without the production of the book, inasmuch as the resolution therein would probably contain the terms upon which the plaintiff was hired. His lordship deciding the objection to be well founded, the plaintiff then gave evidence of a notice to the defendant to produce the book, and claimed to be entitled to give secondary evidence of the contract under the quantum meruit. His lordship, however, refused to receive it; and the plaintiff was nonsuited.

Mr. Serjeant *Bompas* now moved that the nonsuit might be set aside and a new trial had.—The resolution in question was not such an agreement between the parties that the plaintiff was bound to produce it in order to substantiate his claim upon the defendants for services performed by him for them. It was not signed by the plaintiff; nor did it appear to have been communicated to him until after he had entered into the office of secretary in pursuance of the appointment. In *Doe d. Bingham v. Cartwright* (*a*), which was a much stronger case than this, where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were that he should on a future day bring a surety and sign the agreement, neither of which he ever did: it was held that the memoran-

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dum was a mere unaccepted proposal, and need not be produced, but the terms of the letting might be proved by parol evidence. Lord Chief Justice Abbott there said: "I think that in this case there never existed any written agreement between the parties. The paper referred to at the trial would not become an agreement till the defendant had brought a surety and executed it. It contained a mere proposal." And in *Ramsbottom v. Tunbridge* (*a*), a written paper delivered by the auctioneer to the bidder to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, pursuant to the statute 48 Geo. 3, c. 149, nor such a writing as would exclude parol evidence.

Lord Chief Justice TINDAL.—It appears to me that the nonsuit in this case may be supported without in the slightest degree breaking in upon the authorities that have been cited. The case stands on its own peculiar grounds. The action is brought against three individuals who formed part of a committee appointed for the management of the affairs of the charity. There was no evidence of there being any common purse of the committee, or that the defendants had any common interest in the funds of the society; but they are, as members of the committee, charged as having assented to the employment of the plaintiff as their secretary. The resolution of the committee by virtue of which the plaintiff received his appointment is the common voice that binds the committee; otherwise there is no agreement at all. Is it not therefore of the very essence of the plaintiff's case to produce the agreement on which he seeks to charge the defendants?

(*a*) 2 Mau. & Selw. 434.

If we allowed the plaintiff to recover on a quantum meruit, we might be dealing out a measure of remuneration very different from that which the parties had charged themselves with by their agreement. It has been contended that the plaintiff was no party to the resolution, and therefore not bound by it. When he entered, however, into the office of secretary under the resolution in question, he became in that character possessed of the book containing it, and therefore became bound by it, though not actually a party to it. There are many cases in the books to shew, that, where one takes advantage of a deed, and thereby becomes possessed of the thing granted, though no party to the deed, he is nevertheless bound by it. Lord Coke says (*a*): "Albeit he in remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life), yet when he in the remainder entereth and agreeth to have the lands by force of the indenture, he is bound to perform the conditions contained in the indenture." The question therefore is, whether there is any mode of getting at the agreement between the parties in the present case other than by the production of the memorandum itself. I am of opinion that there is not.—The only remaining question is, whether the notice given to the defendants to produce the resolution was sufficient to let the plaintiff in to give secondary evidence of its contents. It seems to me that it was not. The resolution was not shewn to have been in the custody of the defendants; but it appeared to have been in the possession of another member of the committee subsequently to its dissolution. I think it would be too much under the circumstances to say that the custody of that individual was in law the custody of the defendants.

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Mr. Justice PARK.—I am of the same opinion. This case has been very much argued on the notion that the

(*a*) Co. Litt. 230. b.

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plaintiff could not be supposed to know what the book contained. But, when it came into his possession as secretary, who can doubt but that he would acquaint himself with the terms of the resolution under which he obtained the employment? Having, therefore, taken the benefit of the agreement, he is now precluded from objecting that he is no party to it. The principle referred to in Coke Littleton was confirmed in the case of *The King v. Houghton-Le-Spring* (*a*), where it was held, that, to make a valid contract of hiring and service, it is not absolutely necessary that the contract, when by deed, should be executed by the master; it is sufficient that he accepted the services on the terms of the deed: therefore, where a pauper executed a deed by which he became bound to serve the master for a year, and afterwards entered into and continued in his service for that period, it was held that such deed, although not executed by the master, ought to have been received in evidence to shew the terms of the hiring. The language of Mr. Justice Bayley in that case is strong and directly applicable to the present. No one ever heard of a contract of this sort entered into by the members of a committee being signed by both parties. As to the other point, I agree with my Lord Chief Justice that secondary evidence was not admissible. It might have been otherwise had it been shewn that the defendants knew the book to be in the possession of Coleman.

Mr. Justice BOSANQUET.—I am also of opinion that the nonsuit was right. The contract upon which the plaintiff seeks to charge the defendants being a contract by parol on the terms contained in a written paper, it was incumbent on the former to produce that paper. No express contract by the defendants was proved. The plaintiff, it appears, was appointed to the office of secretary to the charity; and, contemporaneously with his taking possession

of that office, he received into his custody the book in which an entry had been made of the terms on which he had been engaged by the committee. That entry therefore constituted the agreement of hiring; and it was incumbent on him to produce it, as being the best evidence to shew the terms upon which he was hired. And as the book was not shewn to be in the possession of the defendants, or of any person as agent for them, secondary evidence of its contents was not admissible.

Mr. Justice ALDERSON.—I am of the same opinion. There was no evidence in this case of any actual specific contract between the plaintiff and defendants. But all that was proved on the part of the plaintiff was, a service by him, in the course of which he must have come to the knowledge of the resolution of the committee containing the terms of his hiring; and, having acted upon that resolution, he must be taken to have adopted it as the basis of the agreement between himself and the committee. I also think with the rest of the Court that secondary evidence of this agreement was not under the circumstances admissible.

Rule refused.

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CLARK v. MARNER.

Thursday,
Jan. 16th.

MR. Serjeant Bompas moved that the writ under which this cause had been tried before a deputy appointed by the Mayor of Colchester, in pursuance of the statute 3 & 4 Will. 4, c. 42, s. 17, might be set aside for irregularity. The enactment in question is "that, in any action depending in any of the superior Courts for any debt or demand

The writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, is to be directed to the Judge of the Court of record in those places in which there is a Court of record, and to the sheriff

where there is no such Court.

A writ of trial was directed to the Mayor of Colchester, and the cause was tried by his deputy. The Court refused to set aside the proceedings on a suggestion that the cause ought to have been tried by the mayor himself; it not appearing that that officer had no authority to appoint a deputy.

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in which the sum sought to be recovered and indorsed on the writ of summons shall not exceed 20*l.*, it shall be lawful for the Court in which such suit shall be depending, or any Judge of any of the said Courts, if such Court or Judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any Judge of any Court of record for the recovery of debt in such county; and for that purpose a writ shall issue *directed to such sheriff*, commanding *him* to try such issue or issues by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or Judge shall summon a jury and shall proceed to try such issue or issues." On the present occasion the writ was directed, not to the sheriff, as the words of the act would seem to require, but to the mayor, who is the Judge of a Court of record at Colchester; and therefore, supposing the writ to have been properly directed to him, he ought to have tried the cause. [Mr. Justice *Alderson*.—Some Judges of Courts of record have by charter the power of appointing deputies; and in such cases the deputy may legally try. Mr. Justice *Park*.—Does not the objection come too late?] In *Hall v. Meddowcroft* (*a*), where a special jury cause had been improperly tried by a common jury, although no objection was taken at the time, the verdict was afterwards set aside.

Lord Chief Justice *TINDAL*.—The Judges met a short time since for the purpose of considering the clause in the act upon which this question arises; and they agreed that the words that have been accidentally omitted out of the

statute may be supplied; and that the writ of trial is to be directed to the Judge of the Court of record in those places in which there is a Court of record, and to the sheriff where there is no Court of record. Upon the present occasion, enough has not been brought before us to induce us to think that there has been a wrong trial. It is clear that the direction of the writ to the mayor is authorized by the statute; and no evidence has been brought before us to shew that the appointment of a deputy by him is not in the due course of the exercise of his office as mayor. Without, therefore, laying down any general rule on the present occasion, it is enough to say that the matters suggested do not satisfy us that there has been such irregularity in the proceedings as to induce us to set them aside.

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Mr. Justice PARK.—The writ in this case was directed to the Mayor of Colchester: and there is a mere suggestion (not upon affidavit) that the issue was tried by the deputy. Probably the return to the writ is in the name of the mayor.

Mr. Justice BOSANQUET.—I am also of opinion that there is nothing brought before the Court upon this occasion to enable it to see that any thing has been done incorrectly.

Mr. Justice ALDERSON.—If there be any objection to the proceedings it will appear on the face of the record: but I see no substantial reason for setting them aside.

Rule refused.

1834.

Friday,
Jan. 17th.

The words,
"He is a thief.
You have rob-
bed me of my
bricks"—Held
actionable, with-
out any intro-
ductory aver-
ment or innu-
endo to explain
them, or any
averment of spe-
cial damage.

SLOWMAN v. DUTTON.

THIS was an action on the case for slander. The declaration, after the common inducement, charged the defendant with having falsely and maliciously spoken of and to the plaintiff, in the presence and hearing of divers persons, the slanderous words following:—"He is a thief." "You have robbed me of my bricks." The defendant demurred, and the plaintiff joined in demurrer.

Mr. Serjeant *Stephen*, in support of the demurrer.—The declaration is insufficient in point of law. The words charged to have been spoken by the defendant do not distinctly impute to the plaintiff any indictable crime: and there is no allegation of special damage. There is no colloquium; no averment that the words were intended as imputing felony to the plaintiff; no innuendo that such imputation was meant; and no allegation of special damage. [Lord Chief Justice *Tindal*.—The statute 7 & 8 Geo. 4, c. 29, made it felony to rob another of money or *chattels*.] Bricks are not of necessity chattels; they may form part of a wall, and in that case they are part of the realty. Although in *Tomlinson v. Brittlebank* (*a*), the words "He robbed J. W." were held actionable, as imputing an offence punishable by law; yet there the count contained an innuendo, explaining that the defendant thereby meant "that the said plaintiff had been and was guilty of an offence punishable by law:" besides, the question there arose after verdict; whereas, here, there is no innuendo to explain the sense in which the words were used, and the point arises on demurrer. Mr. Justice Littledale dissented from the other two Judges by whom that case was decided; saying that he did not think the term "to rob" necessarily meant

(a) 4 Barn. & Adol. 630; 1 Nev. & Man. 455.

taking goods from another by force in the sense of the statute; and that he very much doubted whether the count was good. In *Holt v. Scholefield* (*a*), the words and innuendo were as follow:—"Tim. Holt (meaning the plaintiff) has forsown himself (meaning that the plaintiff had committed wilful and corrupt perjury):" and it was held, that, in the absence of a colloquium in the introductory part of the declaration, the words spoken had not the meaning attributed to them by the innuendo; and that the declaration was bad, after verdict for the plaintiff, in arrest of judgment. Lord Kenyon there said: "Either the words themselves must be such as can only be understood in a criminal sense, or it must be shewn by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable." So here, the word "rob" should have been accompanied by the adverb "feloniously," to make it bear that sense in which alone it would be actionable. In *Clarke v. Gilbert* (*b*), the words "Thou art a thief, and hast stolen twenty loads of my furze," were held not actionable. [Mr. Justice Bosanquet.—At the time that case was decided, the doctrine prevailed which has since exploded, that the words were to be taken in *mitiori sensu*.]

Lord Chief Justice TINDAL.—Whatever doubt might have arisen upon this question before the passing of the 7 & 8 Geo. 4, c. 29, none can arise now. The 6th section of that statute enacts, "That, if any person shall *rob* any other person of any *chattel*, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon." Unless, therefore, we can in the present case conclude that the bricks of which the defendant charged the plaintiff with robbing him were fixed to the freehold, we must hold them to be chattels that may be

(*a*) 6 Term Rep. 691.

(*b*) Hobart, 331.

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the subject of a felony; and therefore that the words in question do impute a felony to the plaintiff, and are consequently actionable. In *Clarke v. Gilbert*, the natural presumption would be that the furze was attached to the freehold.

Mr. Justice PARK.—The case of *Tomlinson v. Brittlebank* was a much stronger case than the present. In that case there were no words descriptive of the thing of which the slander charged the plaintiff with having robbed John White. The judgment of Mr. Justice Littledale clearly shews, that, if such words had accompanied the slander, he would have held the action to be maintainable. It is said that bricks are not necessarily chattels; and that in this case we must presume that they were attached to the freehold: but, when attached to the freehold, they cease to be *bricks* in the ordinary sense of the word.

Mr. Justice BOSANQUET.—I am of the same opinion. Words imputing to the plaintiff that he is a thief are actionable, unless by the context they are shewn to have been used in a sense different from their ordinary acceptation. *Prima facie*, bricks are moveable chattels: and therefore in this case the latter words of the slander serve to strengthen and add to the imputation contained in the former part.

Mr. Justice ALDERSON.—I am of the same opinion. Bricks *per se* are clearly chattels.

Judgment for the plaintiff.

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BEAUMONT, Esq., Chairman of the COUNTY FIRE INSURANCE COMPANY, v. MOUNTAIN.

*Tuesday,
Jan. 21st.*

THIS was an action brought by the plaintiff as chairman and managing director of the County Fire Office to recover from the defendant the value of a parcel containing notes and money, which had been sent, in the year 1829, from Spalding, in Lincolnshire, to London, by the Boston mail coach, of which the defendant was the proprietor. At the trial before Mr. Justice Gaselee, at the Sittings at Westminster during the present term, the plaintiff, in order to substantiate his right to sue as chairman on behalf of the company, offered in evidence the act of parliament by which the affairs of the company are regulated (*a*). By the 1st section the chairman is empowered to sue and be sued on behalf of the company, after the enrolment of a memorial authenticating his appointment as director: and the 7th section provides that the act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded. The plaintiff proved the due enrolment of the memorial required by the act, and also the fact of his having acted as chairman of the company. The witness who produced the act proved that he had purchased the copy some years since at the office of the king's printer. On the part of the defendant it was objected, that, the act being passed for the regulation of the private concerns of the company, it ought to have been proved by a copy examined with the rolls of parliament: and *Brett v. Beales* (*b*) was cited, where it was held that an act of parliament private in its nature was not made admissible in evidence against strangers by a clause declaring that it shall be deemed and taken to be a public act, and shall be

An act for the regulation of the affairs of an Insurance Company contained a clause directing that it should be deemed and taken to be a public act, and should be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded:—Held, that the act was sufficiently proved for all legal purposes, by the production of a copy purchased at the office of the king's printer.

(*a*) 54 Geo. 3, c. xi.

(*b*) 1 Moody & Malkin, 421.

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judicially taken notice of without being specially pleaded. The learned Judge, however, overruled the objection; and the jury returned a verdict for the plaintiff.

Mr. Serjeant *Taddy* now moved that a nonsuit might be entered or a new trial had, on the ground that the act of parliament in question had been improperly received in evidence. The only operation of the clause requiring the Courts to take judicial notice of a private act of parliament without its being specially pleaded, is, to enable the parties to give evidence of it without being put to plead it specially; but it in no respect alters the mode of proof. In *Brett v. Beales*, it was proposed to read, on the part of the plaintiffs, from a copy printed by the king's printer, an act of the 52 Geo. 3, c. cxli, intituled "An act for making and maintaining a navigable canal &c., from &c., to &c.", the 58th section of which recited that the corporation of Cambridge were entitled to divers tolls, and that those tolls might probably be diminished by the establishment of that navigation; and then provided for the letting those tolls by auction, and that, if the rent were less than 400*l.* per annum, the canal company was to make up the deficiency. The 166th section declared that the act should be deemed and taken to be a public act, and should be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded: and it was contended on the part of the plaintiff, that, as the legislature called it a public act, it was so to all intents and purposes, and, among others, for the mode of proof. For the defendants, it was submitted that the only operation of these clauses is to prevent the necessity, in any legal proceedings in which the act comes in question, of setting it out in the same manner as a private deed upon the record: that it goes no further; and that it is merely to facilitate those proceedings, and does not alter the character of the act as public or private, which depends merely on its ob-

jects and provisions: And Lord Tenterden said: "Two grounds have been laid for the admission of this evidence—the one, that the concluding clause renders it admissible as a public act—the other, that, even independently of that clause, it is so from its nature. The answer given to the first was, that the clause only applied to the forms of pleading, and did not vary the general nature and operation of the act. I was inclined to that opinion at the time, and my learned Brothers agree with me in that impression. We also think that the second ground fails. It is said that the bill gives a power of levying a toll on all the king's subjects, and therefore the act is public. The power given is not so extensive, it is only to levy toll on such as think fit to use the navigation. The ground, therefore, on which it is said the act is public, and the evidence admissible, fails." In Phillipps on Evidence, the rule on the subject is thus stated (*a*): "In some acts of parliament not relating to the kingdom at large, a special clause is often inserted, declaring them to be public acts. Such acts are to be considered on the same footing and of the same authority in Courts of justice as those above mentioned (i. e. public statutes); and proof of the contents will be as unnecessary in this case as where a statute is public, without the aid of such a special clause. A clause is also frequently inserted in some private acts, providing that they shall be printed by the king's printer, and that a copy so printed shall be admitted as evidence of the act. When a private act of parliament, not containing such a clause, is required in evidence, the regular proof is by an examined copy compared with the original in the Parliament-office at Westminster.

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Lord Chief Justice TINDAL.—It appears to me that we may determine this case without disturbing the deci-

(*a*) 1 Phil. Evid. 5th edit. 384.

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sion of Lord Tenterden in *Brett v. Beales*. The legislature provides that the act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded. The question, therefore, is, whether, on a matter of law, we are not bound to obey this direction, and to take judicial notice of the act. Whether or not the present plaintiff has a right to sue as chairman of the company, is a mere matter of law: and, upon the words of the act, I think we are bound to say that he is entitled so to sue.

Mr. Justice PARK concurred.

Mr. Justice BOSANQUET.—It appears to me, that, if this act is not to be taken notice of in the way proposed, the clause in question will have no effect at all.

Mr. Justice ALDERSON.—This case may be decided without at all breaking in upon the ruling of Lord Tenterden in *Brett v. Beales*. There, the act of parliament was sought to be used for the purpose of proving certain facts recited in it: here, the act is used for the purpose of the law only.

Rule refused.



Wednesday,
 Jan. 22nd.

In trespass for
 breaking and
 entering the
 plaintiff's apart-
 ment, and beat-
 ing him, the
 venue was laid
 in Middlesex,
 and the declaration charged the defendant with entering "a certain apartment of the plaintiff's in and parcel of a certain dwelling-house situate and being in London." A demurrer, assigning for cause that the action was local and the venue laid in Middlesex, though the offence was alleged to have been committed in London—Held ill.

SMITH v. SMYTH.

THIS was an action of trespass for breaking and entering the plaintiff's room, and beating him. The venue was laid in Middlesex, and the declaration charged that the defendant, on &c., to wit, in the county of Middlesex, and the declaration charged the defendant with entering "a certain apartment of the plaintiff's in and parcel of a certain dwelling-house situate and being in London." A demurrer, assigning for cause that the action was local and the venue laid in Middlesex, though the offence was alleged to have been committed in London—Held ill.

broke and entered a certain apartment of the plaintiff's in and parcel of a certain dwelling-house situate and being in London, and then and there beat the said plaintiff with a stick, &c. The defendant demurred specially; assigning for cause that the action of trespass quare clausum fregit is a local action, and that the plaintiff had laid his venue in Middlesex, although he alleged the apartment entered to be in London, which must be taken to mean the city of London. The plaintiff joined in demurrer.

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Mr. Serjeant Ludlow, in support of the demurrer, submitted, that, inasmuch as London in common parlance means the city of London, and it appeared from the declaration that the place in which the alleged trespass was committed was in that city, the venue should have been laid in London.

Mr. Serjeant Wilde, contra, was stopped by the Court.

Lord Chief Justice TINDAL.—Had the plaintiff alleged in his declaration that the place wherein the trespass was committed was situate in the “city of London,” that might have been ground of demurrer. But the Court will not intend that there is no place within the county of Middlesex called “London.” In the case of *Kearney v. King* (a), the Court of King’s Bench refused to take judicial notice that Dublin is in Ireland: and therefore, where a declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, for a certain sum therein mentioned, without alleging it to be at Dublin in Ireland—it was held that the bill upon this declaration must be taken to have been drawn in England for English money, and therefore proof of a bill drawn at Dublin, for the same sum in Irish money, which differed in value from

(a) 2 Barn. & Ald. 301; 1 Chit. Rep. 28.

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 SMYTH.

English money, did not support the declaration (*a*). Lord Chief Justice Abbott there said: "It is said that the bill is stated to have been drawn in Dublin; but it is not possible for the Court to take judicial notice that there is only one Dublin in the world. Let us suppose, that, instead of Dublin, the bill had been said to have been drawn at St. Germain's; would it have been sufficient, in order to support such a declaration, to give in evidence, not a bill drawn at St. Germain's in Cornwall, but one drawn at St. Germain's in France, for 542 livres, one sous, and eight deniers? Undoubtedly it would not." The demurrer admits every thing that is consistently pleaded. I think there must be judgment for the plaintiff.

The rest of the Court concurring—

Judgment for the plaintiff.

(*a*) And see the same point determined in *Sproule v. Legge*, 2 Dowl. & Ryl. 15; 1 Barn. & Cress. 16.



Monday,
 Jan. 27th.

The plaintiff, assignee of A. who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff on the joint account of A. & B.—The Court allowed B. to inspect the books of A. in the hands of the plaintiff as his assignee, in order that he might discover what the alleged contracts were.

WHITBOURNE v. PETTIFER.

THE plaintiff having sued the defendant in respect of certain contracts alleged to have been entered into by the latter jointly with Messrs. Waterhouse, for the supply of coaches by the plaintiff; and the plaintiff being an assignee of Messrs. Waterhouse in possession of their books—

Mr. Serjeant *Wilde*, on a former day, on the part of the defendant, obtained a rule calling on the plaintiff to shew

cause why the defendant should not be at liberty to inspect and take copies of those parts of the books of Messrs. Waterhouse which related to the supposed contracts, in order that he might discover what they were.

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Mr. Serjeant *Talfoord*, contra, submitted that such an inspection as that prayed in this case had never been allowed; and that, at all events, no sufficient ground had been shewn for it on the present occasion, it not being suggested to what the inspection would lead.

Mr. Serjeant *Wilde*, in support of his rule, contended, that, inasmuch as the plaintiff charged the defendant as being a partner in certain contracts with Messrs. Waterhouse, it was but reasonable that he should be allowed to inspect the partnership books.

PER CURIAM.—This case clearly falls within the rule for allowing a defendant to inspect documents in the custody or power of the plaintiff in which the former has an interest.

Rule absolute.

HORNE v. TOOK.

THE plaintiff having delivered a declaration in this cause, in defiance of an injunction of a Court of equity, restraining him from proceeding at law in respect of the subject matter of the suit—

Mr. Serjeant *Andrews*, on the part of the defendant, moved that the declaration and subsequent proceedings might be set aside for irregularity.

Tuesday,
Jan. 28th.

It is no ground for setting aside a declaration, that it has been delivered in defiance of an injunction of a Court of equity restraining the plaintiff from proceeding at law.

PER CURIAM.—There is no irregularity here; there is

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nothing contrary to the practice of this Court. Whatever the Court of equity may think fit to do in vindication of the order which the plaintiff has transgressed by proceeding in this Court, we cannot interfere.

The learned Serjeant took nothing.

*Wednesday,
 Jan. 29th.*

In November, 1831, the defendant, with the consent of his bail, gave the plaintiff a cognovit for the debt and costs, with a stay of execution until the 8th May, 1832. The defendant making default, a ca. sa. issued against him on the 10th May, which was returned non est inventus. No notice of the defendant's default, or of the ca. sa., was given to the bail. In December, 1833, the defendant died, and on the 7th January following the plaintiff wrote to the bail requiring payment of the debt and costs:—The Court permitted them to enter an exoneretur on the bail-piece.

SURMAN v. BRUCE.

MR. Serjeant *Wilde*, on a former day, obtained a rule nisi to enter an exoneretur on the bail-piece in this cause, on the ground of laches on the part of the plaintiff in giving time to the defendant without notice to the bail. The affidavit upon which the motion was founded, stated, that the bail justified on the 29th June, 1831; that, after the cause was at issue, viz. on the 8th November in that year, the defendant, with the consent of the bail, gave the plaintiff a cognovit for the debt and costs, with a stay of execution till the 8th May, 1832; that, default having been made, judgment was signed on the cognovit on the 10th May, and a ca. sa. issued on the 16th, which was returned non est inventus, and filed with the custos brevium on the 2nd June; that no notice of the defendant's default had been given to the bail until the 7th January, 1834, when they received a letter from the plaintiff, demanding payment of the debt and costs—the defendant having died on the 8th December preceding.—The learned Serjeant referred to *Clift v. Gye* (a), where a plaintiff having, with the consent of bail to the sheriff, taken a cognovit with a stay of execution for a month, it was held that he could not take proceedings against the bail without giving them

notice that the cognovit was unsatisfied: and also to *Charleton v. Morris* (*a*), where bail above, having justified, consented to a cognovit being given upon such terms as might be agreed on between the plaintiff and the defendant (their principal); and, default having been made by the defendant in not paying the debt and costs pursuant to the terms of the cognovit, and a negotiation having afterwards taken place between the parties, the plaintiff sued out writs of scire facias against the bail, and signed judgment thereon, without having given them notice that the negotiation was at an end, or that the cognovit remained unsatisfied—the Court set aside the proceedings.

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Mr. Serjeant *Andrews* now shewed cause.—The application is premature, no proceedings having as yet been taken against the bail. It is true that no actual notice of the cognovit remaining unsatisfied has been given to the bail; but they have not negatived their knowledge of the fact: it was their duty to inquire whether or not their principal had duly paid it. The case of *Clift v. Gye* merely decided that the bail ought to have had notice before they were proceeded against, not that they were discharged of liability. And in *Charleton v. Morris*, there was an attempt to enlarge the liability of the bail. In *Rawlinson v. Gunston* (*b*), it was held, that, if the principal die after the return of the ca. sa., and before the return is filed, the bail are fixed; and the Court would not in favour of the bail stay the filing of the return. That is a much stronger case than the present. It is enough here that the bail have not shewn that they were not aware that the cognovit was outstanding.

Mr. Serjeant *Wilde*, in support of his rule.—*Rawlinson v. Gunston* has no application to the present case; there

(*a*) 4 Moore & Payne, 114; 4 Bing. 627. (*b*) 6 Term Rep. 284.

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SURMAN
v.
BRUCE.

the ca. sa. was regular. Here, however, the plaintiff was evidently lying by for the purpose of deluding the bail: the writ was lodged, and the plaintiff waited until after the defendant's death before he communicated his default to the bail. The reason of the decision in *Clift v. Gye* was, that the plaintiff had taken a cognovit which had the effect of extending the time for the bail to render their principal, and therefore ought not to have proceeded against them without acquainting them with his default.

Lord Chief Justice TINDAL.—I think the rule must be made absolute. The case falls within the principle of *Clift v. Gye*, where the Court of King's Bench held, that, where a case has been taken out of the ordinary course by a negotiation by which time is given to the principal, reasonable notice must be given of the failure of the negotiation, so as to enable the bail to secure themselves by rendering their principal. Here, it is admitted that no notice was given to the bail that the cognovit remained unpaid; but it is said that it must be inferred that they knew it. Notice, however, means something more than knowledge: and I think the bail were entitled to such notice as would enable them to adopt such measures as under the circumstances they could to indemnify themselves. But, as no proceedings have actually been taken against the bail, and they come to ask a favour of the Court, I think the rule should be made absolute only on payment of costs.

Mr. Justice PARK and Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—The ground upon which we make the bail pay the costs of this application, is, that they have come here a little too early.

Rule absolute on payment of costs.

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Friday,
Jan. 31st.

SHINFIELD v. LAXTON.

MMR. Serjeant *Spankie*, on a former day, obtained a rule on behalf of the defendant, calling on the plaintiff to shew cause why there should not be judgment as in case of a nonsuit, the plaintiff having neglected to go to trial. The cause had been at issue about two years.

Mr. Serjeant *Wilde*, contra, objected that there had not been a term's notice of proceedings being taken, as required by the rule of Easter Term, 13 Geo. 2.

Mr. Serjeant *Spankie*, in support of his rule, submitted, that the rule referred to applied to plaintiffs only, and not to the case of a defendant.

Lord Chief Justice *TINDAL*.—The rule is, that, where there have been no proceedings for four terms exclusive after issue joined, a term's notice of the plaintiff's intention to proceed shall be given before the plaintiff can be permitted to proceed to trial. In *Theobald v. Crickmore* (a), this rule was held not to extend to a trial by proviso. Lord Chief Justice Abbott there said: "The practice of moving for judgment as in case of a nonsuit is now generally substituted for that of trial by proviso. It has been decided that a term's notice is not requisite before moving for judgment as in case of a nonsuit; and I think that a similar practice ought to prevail in this case." It therefore seems that the rule does not apply to any proceeding taken on the part of the defendant.

The rest of the Court concurring—

Rule discharged on a peremptory undertaking.

(a) 2 Barn. & Ald. 594; 1 Chit. Rep. 317.

The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant.

1834.

Monday,
Jan. 13th.

The defendants hired a steam-vessel for the day to convey a party to Richmond and back to London. The vessel was navigated by the master, engineer, and crew of the owners, and at their expense:—Held, that the defendants had not such an exclusive possession of the vessel as to entitle them forcibly to expel the plaintiff, who had come on board, with the permission of the master, for the purpose of being conveyed to Richmond.

DEAN v. HOGG and LEWIS.

THIS was an action of trespass. The first count of the declaration stated that the defendants, on the 24th July, 1832, with force and arms assaulted the plaintiff, at &c., and beat, bruised, wounded, and ill-treated him, &c., and seized and laid hold of him, and pulled, dragged, forced, and pushed him about with great force and violence, and then and there with great force and violence pushed and forced him from and out of a certain steam-vessel into a certain wherry then lying and being alongside of the said steam-vessel, to the great and imminent danger of his life, and forced and compelled him to go from the said steam-vessel, and to quit and leave the same in and by the said wherry: by means of which premises the plaintiff was greatly hurt, &c. The second count stated that the defendants and divers, to wit, twelve other persons to the plaintiff unknown, assaulted the plaintiff, and beat, bruised, and ill-treated him; and seized and laid hold of him, and pulled, pushed, forced, and dragged him about with great force, brutality, and violence, and gave and struck him very many severe and violent blows, kicks, and strokes, and greatly hurt, bruised, and injured him, &c. &c. The third count was for assaulting and beating, &c. the plaintiff, and tearing his clothes; and the fourth for a common assault.

The defendants pleaded the general issue and several special pleas of justification. The second specia plea—as to the assaulting and illtreating the plaintiff as in the first count mentioned, and seizing and laying hold of the plaintiff, and pulling, dragging, forcing, and pushing the plaintiff about, and pushing and forcing him from and out of the said steam-vessel in the said first count mentioned into the said wherry, and forcing and compelling him to go from the said steam-vessel, and to quit and leave the same by the said wherry, as in the said first count mentioned—stated

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e.

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that the defendant Lewis, before and at the said time when &c. in the said first count mentioned, was lawfully possessed of the said steam-vessel in the said first count mentioned, and, he being so possessed thereof, the plaintiff, just before the said time when &c., to wit, on the day and year in the said first count mentioned, was wrongfully in the said steam-vessel without the leave or license and against the will of the said defendant Lewis, and during all that time there disturbed the said defendant Lewis in his possession and enjoyment of the said vessel; and thereupon the plaintiff was then and there requested by and on behalf of the said defendant Lewis to go and depart from and out of the said steam-vessel, which the plaintiff then and there wholly refused to do; whereupon the defendant Lewis, in defence of the possession of his said vessel, in his own right, and the defendant Hogg, by his command and in his aid, in defence of the possession of the said defendant Lewis as aforesaid, at the said time when &c. in the said first count mentioned, gently laid their hands upon the plaintiff in order to remove him, and did then and there remove him from and out of the said steam-vessel into the said wherry, as they lawfully might for the cause aforesaid.

The plaintiff replied de injuria, whereupon issue was joined.

The cause was tried before Mr. Justice Alderson at the Sittings in London after last Trinity Term. The facts were as follow—The defendant Lewis had hired a steam-vessel called the Queen Adelaide, for the conveyance of a party to Twickenham on the 24th July, 1833. The contract for the hire of the vessel was contained in a note addressed by the owner to Lewis, as follows:—

“ I note the Adelaide is engaged to you for Richmond or Twickenham, for Tuesday, the 28th of May, at the hire for the day of 5*l.* 10*s.*, your party not exceeding fifty persons.”

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v.
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Whilst the vessel was lying off Whitehall stairs, waiting the arrival of some of the defendant's party, the plaintiff, not being aware of the exclusive nature of the party on board, and being desirous of proceeding to Richmond, went on board with a friend, and was received by the captain as a passenger upon the usual terms. After the vessel had proceeded some distance up the river, the plaintiff and his friend were rudely accosted by the defendants and others of the party, and told that the vessel was hired for their exclusive use, and desired to quit it. Upon the plaintiff's refusal to comply, he was violently assaulted by the defendants, his clothes torn, and himself eventually thrust out of the steam-vessel into a wherry which had been procured for the purpose.

It appeared that the master of the vessel, the engineers, &c., were the persons usually employed and paid by the owners, and that the defendant Lewis had no control whatever over the conduct of the vessel further than could be required for the purpose of the conveyance of himself and party to their place of destination and back.

On the part of the defendants it was submitted that the justification contained in the second special plea was fully made out by the evidence. The learned Judge, however, was of opinion that the defendant Lewis had no such possession of the vessel as that alleged in the plea, and that the plaintiff was consequently entitled to recover.

The jury found a verdict for the plaintiff—damages, 10L.

Mr. Serjeant *Spankie*, in the last term, obtained a rule nisi to enter a nonsuit, on the ground urged at the trial.—He submitted that the contract under which the vessel was hired to the defendant Lewis gave him the exclusive possession or right to the use of her, even as against the owner, for the purposes of the voyage; and therefore that he was justified in removing an intruder.

Mr. Serjeant *Wilde*, in the course of the term, shewed

cause.—The ruling of the learned Judge was perfectly correct: the defendant Lewis was not, as alleged in the justification, possessed of the vessel. The question whether or not the possession of a vessel passes to the hirer or freighter depends upon the general tenor of the contract between the owners and the charterer—*Christie v. Lewis* (a), *Tate v. Meek* (b), *Saville v. Campion* (c). In the present case, there is nothing to shew that the owners ever intended to part with the possession and control of their vessel. Nor was it necessary for the purpose of the contract that they should part with the possession. The vessel was navigated by the master, engineer, steward, and crew belonging to the owners; and not by servants hired for the purpose by Lewis. Suppose the steersman had in the course of the voyage run foul of and damaged another boat, the defendants clearly would not have been responsible for such damage. In *Laugher v. Pointer* (d), where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person; it was held by Lord Chief Justice Abbott and Mr. Justice Littledale, that the owner of the carriage was not liable for such injury. The former learned Judge there said: “If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney-coach to take him for a mile or other greater or less distance, or for an hour or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the Thames be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked

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(a) 5 J. B. Moore, 211; 2 Brod. & Bing. 410. (c) 2 Barn. & Ald. 503.

(d) 5 Barn. & Cress. 547.

(b) 8 Taunt 280.

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if any one should affirm the hirer to be answerable in either of these cases. If the case of a wherry on the Thames does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean, to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners; but I am not aware that any has ever been brought against the charterer." Mr. Justice Bayley and Mr. Justice Holroyd dissented from the opinion above expressed: but in the present case the fact that gave rise to the doubt there does not exist. In *Fletcher v. Braddick* (*a*), a ship was chartered to the commissioners of the navy as an armed vessel, and an injury was done to another vessel by the misconduct of the persons on board the former, while a commander of the navy and a king's pilot were on board; and it was held that an action for the injury might be sustained against the owners of the chartered ship. Sir James Mansfield there said: "The question in this case is, whether the owners of the ship be liable to make good the injury which has happened to the plaintiffs. Notwithstanding the charterparty entered into between the defendants and the commissioners of the navy, the ship belonged to the defendants. It was navigated by a master and sailors provided by them; and it is difficult to say that it is not to be considered as their ship with regard to all the world except the commissioners of the navy. No person can be supposed to know of any private agreement between the owners and the commissioners. As far as appearances went, the defendants continued the owners at the time of the loss, for they paid the master and sailors which they had put on board." In *Hall v. Pickard* (*b*), where it was held, that, if the owner of a horse let him to hire for a

(a) 2 New Rep. 182.

(b) 3 Campb. 187.

certain time, during which he is killed by the owner of a cart driving it violently against him, the remedy of the owner of the horse against the owner of the cart is *case*, and not *trespass*, Lord Ellenborough said: "This is in the nature of an injury to the plaintiff's reversion. He was not in possession of the horses, and, according to the authority of *Gordon v. Harper* (*a*), he neither could have maintained trespass nor trover for them. This is not like a gratuitous permission to use a chattel, as in *Lotan v. Cross* (*b*), where the possession constructively remained in the owner. The horses were let to hire for a certain term to Dr. Carey, who had a right to retain them till that was expired, and who was driving them by his own servants when the mischief was done. Case, therefore, was here the proper and only remedy." In *Dean v. Branthwaite* (*c*), the owner of a chaise and horses let out to hire was held liable for accidents arising from misconduct or negligence of the drivers (employed by him), not the person who hires the chaise. Per Lord Ellenborough—"It appears to me that a person who hires horses to convey him in the manner here stated, has not the entire management and power over the horses; but that they continued under the control and direction of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accident produced by the post-boy's misconduct on the road." So, in *Sammell v. Wright* (*d*), it was held, that, if horses are let to hire to draw a private carriage, but are driven by the servant of the owner, he alone is liable for any injury done by them. Suppose, in the present case, the defendants or any of the party had done any forcible damage to the machinery of the vessel, could not the owners have maintained trespass against

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(*a*) 7 Term Rep. 9; 2 Esp. Rep.
465.

(*c*) 5 Esp. Rep. 35.
(*d*) 5 Esp. Rep. 263.

(*b*) 2 Campb. 464.

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them? and suppose any accident had happened to the boat whilst the party was on shore at Richmond, would they have been liable to the owners in respect of such damage?

Mr. Serjeant *Spankie* and Mr. Serjeant *Coleridge* in support of the rule.—The nature of the contract in this case implies that the exclusive possession of the vessel was given up to the hirer for the voyage; at all events, to the exclusion of strangers: and therefore the admission of strangers on board was a breach of the contract, and the defendants had a right to expel them. In the case of a person put into possession of a room at an inn or tavern, the guest may turn out forcibly any stranger who intrudes himself, whether by leave of the innkeeper or otherwise. In the cases cited on the part of the plaintiff, the true contract was locatio operis faciendi; the owner of the vessel or the carriage never abandoned his possession at all. In *Croft v. Alison* (*a*), where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses, it was held that they were properly described as owners and proprietors of the chariot, in a declaration against a defendant for an accident arising from his servant's negligence in driving against it. And in *Hutton v. Bragg* (*b*), A., the owner of a ship, chartered her to B. for a voyage from London to the Cape of Good Hope, out and home, for a certain sum; the master having liberty to reserve the cabin for his sole use, and the usual accommodation for his crew and ship's stores. The ship arrived at the Cape, discharged her cargo, and took in a return cargo, consisting partly of goods of different persons on freight, and partly of wines consigned to B.—it was held, that, the ship being chartered for the voyage, B. was the owner pro hac vice, and therefore that A. had no lien on his goods. Here, the substance of the justification

(*a*) 4 Barn. & Ald. 590.

(*b*) 2 Marsh. 339.

is, that the defendants and their party were in possession of the vessel, and that was clearly made out by the evidence of the contract of hire for the day.

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question which has been argued before us arises upon the second plea of the defendants, which alleges that Lewis, one of the defendants, was lawfully possessed of the steam-vessel mentioned in the declaration, that the plaintiff was unlawfully in the steam-vessel, from which he would not depart when requested; and then justifies the committing of the trespasses by the defendants in defence of the possession of Lewis, and in order to remove the plaintiff from the vessel: and the question made at the trial and argued before us has been, whether, upon the facts proved, Lewis had such possession of the steam-vessel as would authorize him to use force in removing the plaintiff from it. The evidence, so far as related to the possession of the vessel, was a letter from the owner to Lewis, in these terms:—"I note the *Adelaide* is engaged to you for Richmond or Twickenham, at the hire for the day of 5*l.* 10*s.*; your party not exceeding fifty persons." The vessel was managed by the captain and crew belonging to the same. There can be no doubt that, upon such a contract, although there is no express stipulation to that effect, the defendant Lewis would be entitled to the full enjoyment of the vessel for himself and his party free from the intrusion of any stranger. The circumstances of the case and the object of the voyage necessarily imply it: so that, if the captain afterwards admitted any other passengers for hire or freight to Richmond (as in fact he did admit the plaintiff), such admission would amount to a breach of contract between him and Lewis, for which the latter might have recovered a compensation in damages. There

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can also be no doubt but that, if the plaintiff had been a stranger intruding himself against the will and without the permission of the captain, the captain himself, or the passengers, in his aid, and as his servants, might have justified turning him out. And this seems to have been the opinion of the defendants themselves, who called upon the captain to remove the plaintiff. But the question still arises, whether, under this contract, Lewis had such an exclusive possession of the vessel as would justify him in forcibly putting the plaintiff out of the vessel, admitted as he had been by the captain, in defence of his possession: and we think he had not. It must be admitted, that, in the case of *Hutton v. Bragg* (a), cited by the defendants' counsel, the Court of Common Pleas held, that, by the charter of an entire ship, the possession was parted with to the charterer, so that the owner could have no lien for the freight upon goods put on board: but subsequent cases have narrowed the generality of this doctrine, and have decided that the question whether the possession of the ship has or has not been given up to and taken by the charterer, must depend upon the terms of the instrument taken altogether, or upon the purpose and object of it (b). Here, there was no express contract for the exclusive possession of the vessel by Lewis: and there could be no object or purpose in considering the vessel as taken out of the possession of the owners and put into the possession of Lewis. All that the defendant Lewis bargained for was, that he and his party should be carried by the captain and the crew on board the *Adelaide* to Richmond, without the addition of strangers: and such a contract might be well carried into effect without considering the possession changed from the owners to Lewis. The captain and the crew who continued in the management of the vessel were the servants

(a) 2 Marsh. 339.

4 Mau. & Selw. 288: *Yates v.*(b) See *Trinity House v. Clark*, *Railston*, 8 Taunt. 293.

of the owners, not of Lewis. If any injury had been occasioned by the vessel, the owners, not Lewis, would have been answerable for the damages. There were some parts of the vessel manifestly not in the possession of the defendant Lewis, and some parts to which he had even no right of access or entry, such as the parts occupied by the crew, the room containing the machinery, and the like. If the captain had carried goods to Richmond for other persons to any extent short of incommoding the defendant Lewis and his friends, the defendant could not have prevented it, either by removing the goods or by action against the owners: all which considerations tend to shew the possession was never given up. The case has been compared to that of a person put into possession of a room at an inn or tavern, where the guest (as it is alleged) might turn out by force any stranger who intruded himself, whether by leave of the innkeeper or without. Even admitting such to be the law, the cases are by no means similar. The sole and exclusive possession of the room is given to the guest; there is nothing more to be done by the landlord than to leave him in possession. It is the intent and object of the contract between the parties, that such possession should be exclusive and undisturbed. Even the innkeeper has parted with his right to enter for the time the guest is in possession, except for purposes manifestly implied by their relative situation, or for purposes allowed by law. But, in this case, the merely putting Lewis in possession of the vessel would have been nothing; the main part of the contract remained to be performed by the captain and crew, viz. the carrying them to Richmond and back again, for which purpose it was essential they should remain on board and retain the management and conduct of the vessel. Looking, therefore, at the object and intention of all parties, we think the exclusive possession of the vessel did not pass to the party hiring the vessel for the limited purpose of being carried to Richmond and

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back; and consequently that the plea is not established. And we feel themore satisfied in not being obliged to disturb the verdict, because we think it meets the justice of the case.

Rule discharged.

*Monday,
Jan. 13th.*

By a marriage settlement made in 1811, three several terms of 99 years, 500 years, and 600 years, were vested in three several sets of trustees; the first term for securing a jointure of 200*l.* per annum to the intended wife, the second for raising 5,000*l.* for the

children of the marriage, the third for raising 2,000*l.* to be applied as the intended wife should direct; and a power was reserved to the settlor, with the consent and approbation of the respective trustees of the several terms of 99 years, 500 years, and 600 years, to substitute other lands of competent value for the lands charged with those several terms, whereupon it was provided that the premises originally charged should be wholly released and exonerated, and the said several terms, or such of them whereof the trusts should become unnecessary, should, so far as concerned the premises so to be discharged, cease, determine, and be absolutely void. By deeds of lease and release made in 1814, the settlor conveyed to the trustees named in the deed of 1811 certain lands in lieu and substitution for those charged with the above-mentioned terms. In this deed all the trustees were named as parties; but it was executed only by the settlor, by the trustees of the 99 years' term, and by one of the trustees of the 500 years' term: the other trustee of the latter term afterwards *orally* consented to the substitution; but the trustees of the 600 years' term never did consent:—Held, that, by the deed of 1814, the lands charged by the deed of 1811 were discharged from the annuity of 200*l.* per annum, and from the term of 99 years; but not from the other two sums, or the terms created for securing them—the nature and object of the power and the circumstances of the case pointing to a *previous* consent, and therefore such previous consent being necessary, although not required by the terms of the power; inasmuch as the consent to the proposed substitution implied an exercise of judgment on the part of those who were to give it, which judgment ought to have been formed on the state of circumstances as they existed at the time the substitution was made.

Held also, that, the deed of 1814 being expressly declared to be executed in pursuance and exercise of the power reserved in the deed of 1811, and the uses being declared to be those contained in the last-mentioned deed, the uses declared by the release of 1814 were not executed by the statute in the releases to uses, except so far only as that deed operated as a valid discharge of the premises mentioned in the former deed from the charges thereby created—that is, only in so far as the power was well executed.

pursuance of articles entered into before the marriage of the said Richard Gibbeson and Mary Ann his wife, conveyed to Welfitt and Charlesworth and their heirs, to the use of the said Richard Gibbeson and his assigns for the term of his natural life, without impeachment of waste; remainder to the use, intent, and purpose that the said Mary Ann Gibbeson and her assigns, in case she should survive the said Richard Gibbeson, might, from his decease, receive out of the rents, issues, and profits of the said hereditaments, during her natural life, for her jointure, and in bar of all dower, thirds, and freebench, an annuity of 200*l.*, with power of entry on nonpayment; and, subject thereto, to the use of Richardson and Nelson, their executors, administrators, and assigns, for the term of ninety-nine years, to commence from the decease of the said Richard Gibbeson, upon the trusts thereinafter declared; remainder to the use of Welfitt and Charlesworth, their executors, administrators, and assigns, for the term of five hundred years from the decease of the said Richard Gibbeson, upon the trusts thereinafter declared; remainder to the use of Baldwin and Hebb, their executors, administrators, and assigns, for the term of six hundred years from the decease of the said Richard Gibbeson, upon the trusts thereinafter declared; remainder to the use of the said Richard Gibbeson, his heirs and assigns, for ever. The trusts of the term of ninety-nine years were declared to be for better securing the annuity of 200*l.* The trusts of the term of five hundred years were declared to be for raising 5,000*l.* for the child or children of Richard Gibbeson and Mary Ann his wife. The trusts of the term of six hundred years were declared to be for raising 2,000*l.*, to be applied as Mary Ann Gibbeson should die; and, in default of direction, to the said Mary Ann Gibbeson, her executors, administrators, or assigns. Each of the terms was subject to a proviso for cesser on the trusts respectively being performed or becoming unnecessary.

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The deed of release also contained the following proviso—"That, in case at any time or times hereafter the said Richard Gibbeson, his heirs or assigns, shall be desirous that the said hereditaments and premises hereby settled and charged with the payment of the said jointure or annual rent-charge of 200*l.*, and the said two several sums of 5,000*l.* and 2,000*l.* respectively, or any part of the said premises, shall be released and discharged from the payment of the said jointure and sums of money, or any of them; and in case the said Richard Gibbeson, his heirs and assigns, shall, with the consent and approbation of the respective trustees for the time being of the said several terms of ninety-nine years, five hundred years, and six hundred years hereinbefore limited, charge and secure the said jointure and sums of money, or any of them, upon any other estate or estates, either alone or together with such of the premises hereby charged as shall not be intended to be discharged therefrom (such premises being in the whole of competent value); then, immediately after the said jointure and sums of money, or any of them, shall, with such consent and approbation as aforesaid, have been so effectually charged and secured upon any other estate or estates in manner aforesaid, the said jointure and sums of money, or such of them as shall be so charged and secured as aforesaid, shall thenceforth cease to be a charge upon the messuages or tenements, lands, hereditaments, and premises so thereby charged therewith as aforesaid, or on such or so many of the said premises as shall be intended or agreed to be discharged from the said jointure and sums respectively, or any of them; and the same premises shall thenceforth be wholly released, exonerated, and discharged from the same accordingly; subject nevertheless and without prejudice to any sale, mortgage, or other disposition which may have been made of the said terms, or any of them, under the trusts thereof respectively: and the said several terms of ninety-nine years, five hundred

years, and six hundred years, or such of them whereof the trusts shall become unnecessary, shall thereupon, so far as concerns the premises so to be discharged as aforesaid, cease, determine, and be absolutely void to all intents and purposes whatsoever."

Richard Gibbeson by the said indenture also covenant-ed that he and his said wife should forthwith acknowledge and levy fines of the said hereditaments and premises, which fines it was thereby declared should enure to the uses, upon the trusts, and for the purposes aforesaid. Such fines were subsequently levied accordingly.

By indentures of lease and release dated the 31st of May and 1st June, 1814, the release expressed to be made between Richard Gibbeson of the first part, Welfitt and Charlesworth of the second part, Richardson and Nelson of the third part, and Baldwin and Hebb of the fourth part, after reciting the power, it was witnessed, that, in pursuance and exercise of the power or proviso contained in the said indenture of the 28th of September, 1811, enabling him in that behalf, Richard Gibbeson, with the consent and approbation as well of Welfitt and Charlesworth as of Richardson, Nelson, Baldwin, and Hebb, conveyed as therein expressed to Welfitt and Charlesworth and their heirs certain tenements and premises whereof Richard Gibbeson was then seised in fee simple, that is to say, certain premises in Heightington, in the county of Lincoln, therein described, and also two undivided third parts and two undivided eighteenth parts respectively of and in certain premises in Welton in the said county, therein also described, to have and to hold the same to Welfitt and Charlesworth and their heirs for ever, to the uses, upon the trusts, and with, under, and subject to the powers, proviso-es, declarations, and agreements in the indenture of the 28th of September 1811 expressed and declared concerning the hereditaments in the said indenture of the 28th of September 1811 comprised, to the intent that the

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premises conveyed by the indenture of the 1st of June, 1814, might be charged with the said jointure and the said several sums of 5,000*l.* and 2,000*l.* respectively, in lieu of and as a substitution for such or so many of the premises comprised in the indenture of the 28th of September, 1811, as were intended to be discharged from the payment of the said jointure and sums, and were therein-after described.

The deeds of the 31st of May and 1st of June, 1814, were executed by Richard Gibbeson, Welfitt, Richardson, and Nelson only. Hebb did not in any manner consent to the substitution purporting to be made by those indentures. Charlesworth, after such substitution, consented to it orally, but never in writing. Richardson and Baldwin have since departed this life. Baldwin was the solicitor of Richard Gibbeson at the time of the execution of the indentures of the 31st of May and the 1st of June, 1814, and was one of the attesting witnesses to the execution of the deeds of substitution by Richard Gibbeson; but Baldwin did not execute those deeds or either of them.

Under indentures dated the 1st and 2nd of March, 1821, the 2nd of September, 1821, and the 2nd of March, 1824, all executed by Richard Gibbeson, the plaintiff James Greenham became a purchaser, as mortgagee in fee, from Richard Gibbeson, of the before-mentioned property at Welton, for a valuable consideration, with possession of the title deeds of that property, and without notice of the deeds of the 27th and 28th of September, 1811, and the 31st of May and 1st of June, 1814, or either of them, or of the existence of any right or title thereunder.

The questions for the opinion of the Court were—First, whether, upon the execution of the indentures of the 31st of May and 1st of June, 1814, by such of the parties thereto as executed the same respectively, the estate ori-

ginally settled by the indentures of the 27th and 28th of September, 1811, or any and what part thereof, became vested in Richard Gibbeson in fee simple, freed and discharged from the uses of the last-mentioned indentures—Secondly, whether, upon such execution of the indentures of the 31st May and 1st of June, 1814, Richardson and Nelson acquired any and what interest in the estate at Welton therein mentioned, or any and what part thereof—Thirdly, whether Nelson has now any and what interest in such estate at Welton, or any and what part thereof—Fourthly, whether, upon such execution of the indentures of the 31st May and 1st of June, 1814, Charlesworth and Welfitt acquired any and what interest in such estate at Welton, or any and what part thereof—Fifthly, whether Charlesworth and Welfitt have now any and what interest in such estate at Welton, or any and what part thereof—Sixthly, whether, upon such execution of the indentures of the 31st of May and 1st of June, 1814, Baldwin and Hebb acquired any and what interest in such estate at Welton, or any and what part thereof—Seventhly, whether Hebb has now any and what interest in such estate at Welton, or any and what part thereof.

The case came on for argument in Michaelmas Term last.

Mr. Serjeant *Stephen* (for all the defendants except Nelson, for whom Mr. Serjeant *Talfoord* appeared).—Two general questions arise in this case—first, whether and to what extent the indentures of the 31st of May and 1st of June, 1814, was a valid execution of the power contained in the indentures of the 27th and 28th of September, 1811,—secondly, upon the effect of the first-mentioned indentures considered per se, and not in respect of any substitution for the premises conveyed by the deed of 1811.

It is not contended that the indentures of the 31st May and 1st June, 1814, worked a cesser of the six hundred

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years' term created by the indentures of the 27th and 28th September, 1811, the former deed not having been executed by Baldwin and Hebb, the trustees of that term, nor in any way assented to by them, except that one of them as solicitor attested that deed. But, as to the terms of ninety-nine years and five hundred years, and the annuity and charge thereby respectively secured, the premises conveyed by the deed of 1811 were discharged from the trusts declared by that deed: the trustees of the term of ninety-nine years consented to the substitution and executed the deed of 1814; and with respect to the term of five hundred years, the deed of 1814 was executed by Welfitt, one of the trustees of that term, and Charlesworth, the other trustee, subsequently gave his verbal consent.

Where a power stipulates for the consent of trustees, to give effect to any act done under it, the consent of all is required. Several cases to this effect are noticed in Sudden on Powers (a). But nothing more is required than

(a) Ch. 5, s. 3, 5th edit. pp. 214, 216, 217. "Where forms are imposed on the execution of a power, it is either to protect the remainder-man from a charge in any other mode, or to preserve the person to whom it is given from a hasty and unadvised execution of the power. In each case the circumstances must be strictly complied with. If a writing is required, a disposition by parol will be invalid, although the property might by law be so disposed of—*Thruxtion v. Attorney-General*, 1 Vern. 340. If the power is required to be executed by deed to be inrolled, the deed must accordingly be inrolled; if a particular Court be named, that Court must be resorted to—*Digger's case*, 1 Rep. 173. If the consent of par-

ticular persons be required, their consent must be obtained—*Hawkins v. Kemp*, 3 East, 410; and see *Mansell v. Mansell*, Wilm. 36. If two witnesses are required, one will not do; if the witnesses are to be of the rank of noblemen, commoners will not satisfy the words—*Bath and Montague's case*, 3 Ch. Ca. 55; 2 Freem. 193, affirmed in Dom. Proc. If sufficient subsidy-men be required as witnesses, sufficient and creditable persons who are not subsidy-men will not be good witnesses—*Kibbet v. Lee*, Hob. 312; and see 3 Ch. Ca. 90. If a seal be required, an instrument under hand only will be an invalid exercise of the power—*Dorner v. Thurland*, 2 P. Wms. 506. If the instrument is to be signed, it cannot be execut-

that the power be executed in its terms; a consent of this nature, not passing any interest in lands, need not be in writing, it not being within the statute of frauds; for, it is merely a collateral agreement to give effect to the power. Upon the general principles of the common law, every transaction by parol is valid, unless by any specific rule of law it is required to be in writing. In Brooke's Abridgment, title "Barre," pl. 3, it is said that "a discharge by parol given by the plaintiff to the sheriff as to a prisoner in his custody, is a satisfaction of the debt." So, a command to receive rent may be by parol—*John Souch's case* (*b*). So, a parol license to put sheep on a common, was held sufficient, no interest in the lands passing by it—*Ramsey v. Rawson* (*c*). In *The Queen v. Sutton* (*d*), it is said: "The deputation of an office is in its own nature grantable by parol; and therefore, though it should happen to be granted by writing, yet, since it is in itself grantable by parol, it may be revoked by parol." In Watson's Incumbent (*e*), after noticing several cases as to the mode of making a presentation, the learned author observes: "The reason of these cases seems to be, because nothing is granted or given by a presentation, it being but a commendation of a clerk to the ordinary, or a declaration of the king's will, and not any interest, and may be made as well by the word of the patron only (unless a corporation aggregate be patron, for they must present under their

ed otherwise—*Birde v. Stride*, cited Bridg. 21; and if signature and sealing be required, an instrument unsigned will not be valid, although sealed—*Thayer v. Thayer*, Palm. 312 — *Blockville v. Ascot*, 2 Eq. Ca. Abr. 659, side-note. If notice is required to be given, the execution of the power will be void if notice be not given ac-

cordingly—*Ward v. Lenthall*, 1 Sid. 143. And so in every case that the ingenuity of man can devise, the terms of the power must be complied with."

(*b*) Cro. Eliz. 22.

(*c*) 1 Ventris, 25.

(*d*) 10 Mod. 74.

(*e*) Watson, c. 15, p. 151.

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common seal) as by an instrument in writing." The presentation is in the nature of a consent by the patron. "Whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwise, where it takes effect out of an interest, and is to enure as a grant; for, then, if it be of a thing incorporeal, it must be by deed"—Per Curiam, in *Saunders v. Owen* (*f*).

The after assent of Charlesworth had relation back to the time of the execution of the deed of 1814, and rendered it valid. In *Burton v. Humphries* (*g*), property was devised to C. L., subject to a condition, "that, if she married without the consent of N. H. in writing, then &c."—and the estate was given over: she married without his privity, but he gave his consent as soon as he knew of the marriage: Lord Hardwicke held this a sufficient consent to entitle her to the real and personal estate which was given her if she married with the consent and approbation of N. H., to be signified in writing.

The power is for the substitution of such parts as the settlor might think fit; which power is to be exercised "with the consent and approbation of the *repective* trustees for the time being of the said several terms of ninety-nine years, five hundred years, and six hundred years. Under this proviso, the consent of any one trustee would suffice as to the term represented by him and his co-trustee. At all events, the consent of each set of trustees only was required in reference to the separate interests represented by each of them—the proviso being for a cesser of each of

(*f*) 2 Salk. 467.

(*g*) Cited in *Long v. Dennis*, 4 Burr. 2056, 1 Sir W. Blac. 631. And see *Daly v. Clanricarde*, cited 4 Burr. 2055, and 1 Sir W. Blac. 631, where the condition was that the party should marry with the consent of trustees; if not, the

estate was given over. The trustees were applied to: they offered to agree on a proper settlement being made. The marriage was had without their knowledge; but, the settlement being afterwards made, their conditional consent was helden to be sufficient.

the terms in the event of a substitution, and there being no community of interest. In *Slingsby's case* (*h*) the general principle is thus laid down: "When it appears by the declaration that every of the covenantees hath or is to have a several interest or estate, there, when the covenant is made with the covenantees *et cum quolibet eorum*, these words 'cum quilibet eorum' make the covenant several in respect of their several interests. As, if a man by indenture demises to A. black acre, to B. white acre, to C. green acre, and covenants with them and quilibet eorum that he is lawful owner of all the said acres, &c., in that case, in respect of the said several interests, by the said words 'et cum quilibet eorum,' the covenant is made several. But, if he demises to them the acres jointly, then these words 'cum quilibet eorum' are void; for, a man by his covenant (unless in respect of several interests) cannot make it first joint, and then make it several by the same or the like words, *cum quilibet eorum*; for, although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several, at the election of the obligee, yet a man cannot bind himself to three and to each of them, to make it joint or several at the election of several persons, for one and the same cause." "So, if a man makes a feoffment in fee by deed to three, and warrants the land to them *et cuiilibet eorum*, this warranty is joint and not several: but, in such case, if their estates were several, their warranty should be several accordingly. *But, a power or authority, as, to make livery, or to sell, &c., may be joint and several, for there they have not any interest or action, but are as servants to others.*" In *Merriton's case* (*i*), A. and B. leased to M. for years, and covenanted that he might alien without disturbance, interruption, or incumbrance by them, and an

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(*h*) 5 Rep. 18 b. And see *Windham's case*, 5 Rep. 8.

(*i*) Noy's Rep. 86; S. C. nom. *Sanders v. Meryton*, Popham, 200.

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obligation was made for performance, &c. A. made another lease to C., who entered, and M. brought debt. Per Curiam.—“ It is well, for the covenant is broken, and ‘ them ’ shall not be taken jointly only, but severally also.” In *Hawes v. Warner* (*k*), legacies were given by a will to four grandchildren, upon condition, that, as they came of age, they should release all claims to the testator’s estate: it was held that this condition must be taken distributively; and that such only as refused to release should forfeit their legacies.

The only remaining question is, as to what effect the deed of 1814 has intrinsically, supposing it not to operate a valid substitution. [Lord Chief Justice *Tindal*.—If the deed of 1814 operates no substitution of the premises secured by the terms created by the deed of 1811, we can give no effect to it.] A recital in a common law conveyance cannot have the effect of altering the legal operation of the deed. Whether the deed of 1814 be a good execution of the power or not, still, by the operation of the statute of uses, the releasees in that indenture must be considered by a Court of law to take the estate upon the several uses expressly inserted in the deed, which uses the statute must of necessity execute.

Mr. Serjeant *Merewether*, contra.—With respect to the consent of Charlesworth, one of the trustees of the term of five hundred years, two objections arise—first, that it was given subsequently to the execution of the deed of 1814—secondly, that it was by parol. Now, it is clear, from the words of the proviso, that the subsequent consent is unavailing: the substitution was to be made “ with the consent and approbation of the respective trustees for the time being.” The consent and the act must, therefore, be concurrent, the former being the condition upon which

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the power was to be executed. If it be otherwise, it will be left in uncertainty when the substituted estate vested. In *Bateman v. Davis* (*l*), by a settlement on the marriage of A., a power was given to the trustees, by and with the consent of A., if living, to be testified by writing under her hand, and attested by two or more credible witnesses, to advance 1,500*l.* to her husband: the trustees advanced the money without the consent of A.; but she afterwards, by an instrument under her hand, attested by two witnesses, testified that the money was advanced with her consent: on a bill filed by A., it was held that the trustees must refund the money. "The settlement (said Sir John Leach) gives a discretion to the trustees, with the consent of the plaintiff, to advance 1,500*l.* stock to the husband of the plaintiff. The trustees think fit to advance the 1,500*l.* without the consent of the plaintiff. They cannot justify this breach of trust by alleging the subsequent approbation of the plaintiff. The actual advance of the money to the husband, who perhaps had spent it, created a pressure upon the judgment of the plaintiff which gave to her subsequent approbation a very different character from the free consent required by the settlement." Upon the authority of that case, therefore, as well as upon the words of the deed, it is perfectly clear that the subsequent assent of Charlesworth could not avail.

The trustees are described as parties to the deed of 1814; but no one looking at the deed could know whether they had both consented or not. Ordinarily speaking, the execution of a power should be in writing. The cases cited on the other side, with the exception of *Saunders v. Owen*, are not at all analogous to the present; they are all cases of acts in pais in the ordinary course executed by parol. In *Saunders v. Owen*, however, it was only held that the execution of a power is good without deed; not

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that a mere oral consent would suffice. In the present case it is said that the act required to be done by the trustees passes no interest in the lands. That, however, is not so; for, the lands charged by the deed of 1811, are not to be discharged but upon a due execution of the power of substitution given by that deed; and the consent of the trustees was part of the execution of that power; its effect, therefore, was, to charge one estate and to discharge another. In *Lord Mordant v. The Earl of Peterborough* (*m*), "the plaintiff claimed by deed of lease and release by the Earl, and sealed by the Earl and Countess, wherein was a power of revocation, and was urged as a revocation of another settlement, 9 Car. 1, wherein was a proviso that the said Earl might by the consent of the Countess obtain in writing a revocation, in the presence of three witnesses: and it was doubted that her bare sealing the later deed was no sufficient assent to make a revocation, unless the later conveyance had been said to be by assent of her, or a mention of her consent in any other clause; and there was reason to make her party to the later deed, to save her jointure."

In order to give effect to the deed of 1814, as operating a cesser of any one of the terms created by the deed of 1811, the consent of all the trustees was requisite (*n*). In *Hawkins v. Kemp* (*o*), where, in a marriage settlement made by tenant in tail, he settled the lands to himself for life, and to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing, attested by three witnesses, and to be inrolled, with the consent in writing of certain trustees, to revoke the old and declare new ones—it was held that a deed of revocation executed by him and all the trustees in person, except one, and the consent of that

(*m*) 3 Keble, 305.

waters v. Birt, Cro. Eliz. 856.

(*n*) Co. Litt. 112. b., 113 a. *At-*

(*o*) 3 East, 410.

one being given by means of a general power of attorney before made by him to the settlor, to consent to any such deed as he might think proper to make, by virtue of which the settlor executed the deed for and in the name of such trustee, was bad, though properly attested and inrolled; and that another deed of revocation properly executed and assented to, but not inrolled till after the settlor's death, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the lifetime of the person by whom it is to be executed; and it was also held that the defect of the one deed could not be supplied by the other.

The deed of 1814 can have no operation as a deed per se. If it be no good execution of the power of substitution given by the deed of 1811, the whole object and intention of it fails; it was made for the mere purpose of executing the power reserved by the former deed.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the Court:—

We think it may be advisable in this case to state generally the grounds upon which the answers certified by us to the Lord Chancellor have proceeded, in order that it may not be left in doubt on which of the points argued before us our judgment has been formed.

The broad and general question is, whether the power of substitution of new premises in the place of those charged by the settlement of 1811, and of discharging the former premises from the several charges thereby created, and of causing a cesser of the three several terms therein, of ninety-nine years, five hundred years, and six hundred years, created by that settlement, has been well and effectually executed by the indentures of the 31st May

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and 1st June, 1814, either as to the whole or as to part of those charges and those terms.

Now, the only objection raised against the valid execution of the power rests upon the nature of the consent which has been given by the trustees in whom those several terms were vested at the time of the execution of the indentures of 1814. The general question, therefore, which we have had to consider is, whether such consent was sufficient in respect to the whole or to any of the several charges or terms. The plaintiff, however, in the course of the argument stated a preliminary point which would make our consideration of the due execution of the power unnecessary; for, the plaintiff contended, that, whether it is a good execution of the power or not, that is, whether the property charged by the former settlement is discharged or not, still, by the mere operation of the statute of uses, the releasees in that indenture must be considered by a Court of law to take the estate upon the several uses expressly inserted in the deed, which uses the statute must of necessity execute. But we think the uses declared by the release of the 1st June, 1814, were not executed by the statute in the releasees to uses, except so far only as that deed operates as a valid discharge of the premises mentioned in the former settlement from the charges thereby created, and causes a cesser and determination of the terms thereby created; that is, except in those cases only where the power is well executed: for, it is impossible to read the recital and the operative part of the release of the 1st June, 1814, without perceiving that the meaning and only meaning of the uses declared was the execution of the power. The power itself is recited; the deed is expressed to be executed in pursuance and exercise of the power; the uses are declared to be those contained in the former settlement; and the intent is expressly stated to be, that the premises thereby conveyed might be charged with the jointure, and with the sums of

money, as a substitution of part of the premises in the former indenture (which are particularly specified), and that such part might be discharged from those several charges and from the terms of years. But, in order to ascertain what uses are declared by a deed, we have only to ascertain the meaning and intention of the party declaring the uses by the words he has used; for, as it is laid down in Moore (*p*)—"The limitation of a use is but the direction of a trust. And such writings, words, or circumstances, as manifest the intention and mind of the feoffor are a sufficient declaration of a use." And it would be against the direct and manifest intention of the releasor, and is, as it seems to us, against the express words which he has used, if we should hold that he meant to create a double security for the former charges; to leave those charges a burthen on the premises mentioned in the settlement of 1811, and to give an additional security for them on the new.

We think, therefore, that, in substance and effect, no uses are declared in this case, except where they effect the intention of the releasor, that is, where they operate as a valid execution of the power of discharge and substitution. And therefore the question is still to be discussed, whether there has been a valid execution of the power or not; and that question, as before noticed, depends upon this, whether the consent of the trustees has been properly given.

Now, in the first place, it appears to us that the several charges and the several terms of years are kept so far separate and distinct from each other that there may be a valid execution of the power as to one of the charges and one of the terms by a proper consent of the trustees of such one charge and term of years, although there may be no proper consent given as to the others, and the execu-

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tion of the power as to them may fail. It seems impossible to read the power and to doubt that such was the intention of the parties.

With respect, then, to the jointure, and the term of ninety-nine years vested in Richardson and Nelson, there has been an execution of the power free from all doubt and difficulty; for, the two trustees declare their consent and approbation to the substitution of the new premises previous to and at the moment of making the substitution, and they declare it in the most formal manner, by becoming parties to and executing the deed by which the substitution is made.

With respect to the charge of 2,000*l.*, and the term for six hundred years in Baldwin and Hebb created to support that charge, it appears to us to be equally free from doubt that the power has not been executed. Both the trustees were alive at the execution of the power, and Hebb (one of the trustees) has never consented at all.

With respect to the remaining charge of 5,000*l.*, and the term for five hundred years vested in Welfitt and Charlesworth for the purpose of raising that sum, it appears to us there has been no valid execution of the power, on the ground that there was no consent by *both* the trustees previous to or at the time of the intended execution of the power.

Whether in all cases a consent, where necessary, must be given *before* the execution of a power, or whether it will in some cases be sufficient to ratify the execution of the power by a *subsequent consent*, it is unnecessary at present to determine. It is sufficient to lay it down, that, where the nature and object of the power and the circumstances of the case point to a previous consent, there such previous consent is necessary, although not required by the terms of the power. In the present case, the consent to the proposed substitution implies an exercise of judgment on the part of those who are to give it, which judg-

ment ought to be formed on the state of circumstances as they exist at the time when the substitution is to be made. In this case, therefore, it seems to us a necessary consequence, that the consent must precede, or at all events accompany, the execution of the power. The check intended to be interposed against the improper substitution of a new security in the place of the old one, was the agreement in opinion of each set of trustees that the substituted security was at least as available for the charge of which they were the trustees as that which was given up. But this of all others is a question which ought to be determined by the comparative value of the two estates at the time of the substitution; and ought not to be a question left uncertain and subject to the chance of the substituted estate becoming afterwards more valuable, and the consent of the trustees to be therefore procured at a future time. Indeed, it is impossible to read the words of this power without perceiving the intention to have been that the consent of the trustees should form a condition precedent to the execution of the power—"In case the said Richard Gibbeson shall, with the consent of the said trustees, secure &c."—words that are inconsistent with the supposition that the substitution should for a time be left in uncertainty whether it was approved of or not.

It is upon these general grounds that we have agreed in the opinion expressed in our certificate to the Lord Chancellor.

The following certificate was afterwards sent:—

"First—We are of opinion, that, upon the execution of the indentures of the 31st of May and the 1st of June, 1814, by such of the parties thereto who executed the same, so much of the estate originally settled by the indentures of the 27th and 28th of September, 1811, as is described in those indentures to be situated in the city of Lincoln and in Dorrington in the county of Lincoln, con-

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tinued to be vested in Richard Gibbeson in fee simple, freed and discharged from the said annuity of 200*l.* per annum, and from the term of ninety-nine years created by the said indenture of the 28th of September, 1811; but subject and liable to the charges of 5,000*l.* and 2,000*l.*, and to the respective terms of five hundred years and six hundred years created by the same deed for securing the said sums.

“Secondly—We are of opinion, that, upon the execution of the said indentures of the 31st of May and the 1st of June, 1814, Richardson and Nelson became interested in the premises at Welton for the residue then subsisting of the term of ninety-nine years originally created by the former indenture of the 28th of September, 1811, and upon the trusts thereby declared of the said term.

“Thirdly—We are of opinion that Nelson is now interested in the same premises for the residue of the same term now subsisting, and upon the trusts aforesaid.

“Fourthly—We are of opinion, that, upon such execution of the indentures of the 31st of May and the 1st of June, 1814, Charlesworth and Welfitt acquired no interest in the estate at Welton.

“Fifthly—We are of opinion that Charlesworth and Welfitt have no interest now in the estate at Welton.

“Sixthly—We are of opinion, that, upon such execution of the indentures of the 31st of May and the 1st of June, 1814, Baldwin and Hebb acquired no interest in the estate at Welton.

“Seventhly—We are of opinion that Hebb has no interest now in the estate at Welton.

“N. C. TINDAL.

“S. GASELEE.

“J. B. BOSANQUET.

“E. H. ALDERSON.”

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ACEBAL v. LEVY and SALMON.

Friday,
Jan. 13th.

THIS was an action brought by the plaintiff, a merchant residing at Gijon, in Spain, to recover damages from the defendants for not accepting a cargo of nuts consigned to them.

The fourth count of the declaration stated that the defendants bargained for and bought of the plaintiff, and the plaintiff, at the special instance and request of the defendants, sold to the defendants a certain large quantity, to wit, one thousand barrels of nuts, at a certain price or value, to wit, at the then usual and common shipping price for nuts at the port of Gijon, in the kingdom of Spain, to be delivered by the plaintiff to the defendants at London on the arrival of the said last-mentioned nuts from the port of Gijon at London, and to be paid for by the defendants to the plaintiff on the delivery thereof, and the freight for the carriage thereof to be paid by the defendants: and, in consideration thereof, and that the plaintiff, at the like special instance and request of the defendants, would deliver the said quantity of nuts at the place aforesaid, they the defendants undertook and faithfully

One A., having chartered a ship called the Active to proceed to Gijon, in Spain, for a cargo of nuts to be shipped by the plaintiff, whose agent A. was, it was agreed between the defendants and A. that the Active should be loaded on account of the defendants, who directed A. to procure for them a cargo of nuts from the plaintiff. A. accordingly wrote to the plaintiff a letter, in which, after speaking of that vessel being chartered for the purpose of bringing home nuts, he said: "We have transferred the Active to Measrs. L. & S.

(the defendants), for whom you will please to load her, in place of consigning her to us." On their arrival the defendants refused to accept the nuts. In an action for such non-acceptance:—Held, that the above was a sufficient note or memorandum of the contract to take the case out of the statute of frauds, in so far as it sufficiently disclosed the subject matter of the contract, and was a memorandum signed by an agent of the parties properly authorised.

But, the special count thereon being framed upon an agreement to pay for the nuts "at the then shipping price at Gijon," and such being the contract proved by the parol evidence at the trial:—Held, a variance; inasmuch as the contract to be inferred by law from the written memorandum, was a contract to furnish a cargo, not at the price at the shipping port, but at a reasonable price—that is, such a price as the jury, upon the trial of the cause, should under the circumstances decide to be reasonable.

Where a contract that is silent as to price is *executed* by the acceptance of the goods by the defendant, the law will supply the want of an agreement as to price, by inferring that the parties must have intended a reasonable price: but, quære whether the same inference arises where the contract is *executory* only, and the goods still remain in the possession or under the control of the seller?

Quære whether the vendor of goods is precluded from maintaining a count for goods bargained and sold, where the goods have been re-sold by him on the vendee's refusal to accept them?

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promised the plaintiff, to accept the said nuts of and from him the plaintiff, and to pay him for the same on the delivery thereof to them the defendants: and the plaintiff averred, that the usual and common shipping price and value of the said nuts at the port of Gijon, at the time of the making of the last-mentioned promise and undertaking by the defendants, was at and after the rate of *3l. 1s. 4d.* for each and every barrel of the said nuts; and, although the plaintiff afterwards and on the arrival of the last-mentioned nuts at London from Gijon, to wit, on the 12th October, at &c., was ready and willing, and then and there tendered and offered to deliver the said nuts to the defendants, and then and there requested the defendants to accept the same, and to pay him the plaintiff for the same as aforesaid; yet the defendants, not regarding their said promise and undertaking, but contriving and intending to deceive and defraud the plaintiff in that respect, did not nor would at the said time when they were so requested, or at any time before or afterwards, accept the said last-mentioned nuts, or any part thereof, of or from him the plaintiff, or pay him for the same, or any part thereof, at the rate or price last aforesaid, but then and there wholly neglected and refused so to do.

The declaration also contained counts for goods bargained and sold, and sold and delivered, and the common money counts. The defendants pleaded the general issue.

The cause was tried before Mr. Justice Alderson at the Sittings at Guildhall after Trinity Term, 1833, when the facts proved were as follow:—Messrs. M'Andrew & Sons, brokers in London, who had been in the habit of chartering ships and sending them out to the plaintiff at Gijon for the purpose of their being loaded with nuts, &c., for the London market, in the year 1831 chartered the ship Active. Being subsequently applied to by the defendants, fruit merchants in London, to procure for them a quantity of nuts,

M'Andrew & Sons agreed to give them the benefit of the Active and her cargo, which was to be delivered to the defendants, and to be paid for by them, at the then shipping price at Gijon, on delivery; and thereupon, on the 29th July in that year, wrote to the plaintiff a letter, in which, after speaking of several vessels which they had sent out to the plaintiff to be loaded with nuts, they stated, amongst other things: "We have transferred the Active to Messrs. Levy & Salmon, for whom you will load her, in place of consigning her to us. They are to pay us for freight 120*l.*, and ten guineas gratuity, which please insert in the bill of lading." The Active accordingly proceeded to Spain, and returned in the month of October loaded with nuts, the bill of lading and invoice of which were transmitted by the plaintiff to M'Andrew & Sons for the defendants. Before their arrival the defendants objected to the price, and, on notice given to them by M'Andrew & Sons that the nuts were ready for delivery, they refused to receive or to pay for them. The nuts were subsequently sold by M'Andrew & Sons for the benefit of whom it might concern; but the price obtained for them was 211*l.* less than the amount at the usual shipping price at Gijon at that period.

On the part of the defendants it was objected—first, that there was no sufficient note or memorandum of the contract in writing, signed by the parties or their agents, to take the case out of the statute of frauds—secondly, that there was a variance between the fourth count and the agreement produced in support of it, in respect of the allegations as to the payment of freight, and of the price to be paid for the nuts—thirdly, that the agreement given in evidence did not support the count on a quantum valebant—fourthly, that the plaintiff had, by his own act, in reselling the nuts before the commencement of the action, precluded himself from maintaining the count for goods bargained and sold. The learned Judge, yielding to these objections, nonsuited the plaintiff.

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Mr. Serjeant *Wilde*, in Michaelmas Term last, obtained a rule nisi that the nonsuit might be set aside, and a verdict entered for the plaintiff for 211*l.*, the amount of the loss on the re-sale of the nuts.—He cited *Schneider v. Norris* (a) and *Mertens v. Adcock* (b).

Mr. Serjeant *Jones* and Mr. Serjeant *Stephen*, in the course of the same term, shewed cause.—1. The statute 29 Car. 2, c. 3, s. 17, enacts that “no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized.” In the present case the value of the goods contracted for exceeded 10*l.*, and there has been no part payment, no delivery; and the question therefore is whether the letter written by M‘Andrew & Sons to the plaintiff on the 29th July, 1831, is a sufficient note or memorandum in writing of the bargain to satisfy the words of the statute. One of the primary objects of the statute was, to prevent the terms of the contract being misrepresented by parol evidence; and to attain this object the contract must be reduced to certainty—certainty as to price (c), credit, mode of payment, &c. [Lord Chief Justice *Tindal*.—The act does not require a very exact note of the contract. The words are “*some* note or memorandum in writing:” such a note as merchants in the hurry of business may be supposed to use.] The statute requires that the particulars of the contract, at least as to the main ingredients, be reduced to writing,

(a) 2 Mau. & Selw. 286.

(b) 4 Esp. Rep. 251.

(c) *Elmore v. Kingscote*, 5 Barn. & Cress. 583; 8 Dow. & Ryl. 343.

so as to exclude the fraud and the perjury it professed to guard against. The letter in the present case shews that there was a pre-existing contract between M'Andrew & Sons and the plaintiff, and that the object of that letter was merely to transfer such contract to the defendants. There is nothing to shew what the previous contract was: and it is only by inference that it is to be understood that the subject-matter of the contract is a cargo of nuts. For any thing that appears upon the face of the contract, the price might have been stipulated between the parties: there is nothing to warrant an inference that they were contracting for a reasonable price. [Lord Chief Justice *Tindal*.—If on the general effect of the correspondence, it appears that the parties were bargaining for an uncertain price, it is no objection to the note that the price is not specified.] In *Richardson v. Porter* (*d*), an invoice of hops described the names of the seller and buyer; the latter, after the receipt of the invoice, wrote to say that the hops had not as yet arrived, and that if they did not arrive soon he must buy some elsewhere: it was held that the invoice and the letter taken together did not constitute a sufficient memorandum under the statute (*e*).—Then, as to the agency of M'Andrew & Sons—A London merchant applies to the correspondents of a Spanish house, and gives a verbal order for goods; is the letter of the agents to the principal abroad to be taken to be a memorandum of the contract between the parties? [Lord Chief Justice *Tindal*.—There was evidence enough at the trial to shew that the defendants constituted M'Andrew & Sons their agents for the purpose of procuring the nuts in question. They were the agents of both parties. The plaintiff could have nothing to do with the transfer of the

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(*d*) 6 Barn. & Cress. 437.

(*e*) See the various authorities upon the subject conveniently col-

lected in Mr. Roberts's Treatise upon the Statute of Frauds, p. 105.

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Active by M'Andrew & Sons to the defendants.] This is not like the case of a contract made by an auctioneer or a broker, persons who are known to be competent to bind both parties. M'Andrew and Sons were the known agents of Acebal; and they were in that character only treated with by the defendants, who never could have intended to give them authority to consider themselves as their agents.

2. The fourth count states that to have been part of the contract between the plaintiff and defendants, which upon the evidence appeared to have been merely a bargain between the defendants and M'Andrew & Sons, viz. that the freight was to be paid by the defendants; whereas it is admitted that the payment of freight was no part of the contract between the plaintiff and defendants; and, although it is not expressly alleged that such freight was payable *to the plaintiff*, yet that is the necessary intendment of the allegation. A variance occurs where one matter is clearly implied in the pleading, and another proved. In *Sproule v. Legge* (*f*), where a declaration upon a promissory note made in Ireland, alleged that it was made payable at No. 81, Dame Street, Dublin, for sterling money, without averring that Dublin was in Ireland, and that the money for which the note was given was Irish currency; it was held to be insufficient, as the note must be taken to have been drawn in England, and for English money, and was not supported by proof that it was made at Dublin, in Ireland, and for Irish money.

3. The objections urged to the plaintiff's claim to recover under the special count, apply with equal force to the count for goods bargained and sold, as upon a contract for a reasonable price. The letter given in evidence was not a note or memorandum of a contract of sale at a rea-

(*f*) 2 Dow. & Ryl. 15; 1 Barn. see *Kearney v. King*, 2 Barn. & Cress. 16; 3 Stark. 156. And Ald. 301; 1 Chit. Rep. 28.

sonable price; inasmuch as it was altogether silent as to price, and the parol evidence shewed that the contract was for a sale at the then shipping price at the port of Gijon.

4. Another objection to the plaintiff's right to recover on the count for goods bargained and sold is, that, before he had parted with the property in the goods, he re-sold them. The seller, by exercising this sort of dominion over the goods, altogether rescinds the contract, or at all events the sale. It is perfectly clear, upon the authorities, that, after a re-sale by the vendor, an action for goods bargained and sold will not lie—*Hore v. Milner* (g), *Hagedorn v. Laing* (h). “If the vendor of goods,” says Lord Chief Justice Best, in delivering the judgment of this Court in *Maclean v. Dunn* (i), “insist on having from the purchaser the price at which he contracted to dispose of them, and he afterwards re-sell them, he cannot maintain an action for goods bargained and sold; as, in order to claim the price agreed to be given for them by the purchaser, he must continue to exercise a dominion over them. But, if he sue the purchaser for damages by reason of his refusal to perform or complete the contract, it is not necessary for him to keep dominion over the goods; he may allege that the vendee had entered into a contract for the purchase of certain articles, and that he refused to perform it, in consequence of which the goods were sold at a less price; whereby he had sustained a damage. In such a case, it is not necessary that the property should remain in the hands of the seller unchanged at the time he commences his action for damages for the breach of contract; nor is it necessary for him to allege that fact in his declaration.” From all the cases, therefore, it is clear that the plaintiff's remedy in this case, if any, must be on a special count adapted to the circumstances.

(g) Peake's N.P.C. 42, n. (h) 6 Taunt. 162; 1 Marsh. 514.

(i) 1 Moore & Payne, 781; 4 Bing. 722.

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Mr. Serjeant *Wilde*, in support of his rule.—1. The price of the article was not known in London at the time the contract was entered into; the memorandum, therefore, could not contain the price. The whole of the bargain was, that the Active should be laden with nuts; all the rest is properly left to legal inference. It is not necessary that all the minutiae of a contract should appear on the face of the note or memorandum in order to satisfy the statute; the entire contract need not be set out, as in the case of a promise (under s. 4) to pay the debt of a third person. It is said that M'Andrew & Sons had no authority to sign the memorandum as agents for the defendants. But it appears on the evidence that they desired M'Andrew & Sons to procure the Active to be loaded by the plaintiff with a cargo of nuts for them; and, when the defendants gave the order, it must of necessity be presumed that they intended M'Andrew & Sons to write to the plaintiff on their behalf.—Then, there was a sufficient delivery of the nuts to the defendants to take the case out of the statute of frauds. The delivery was complete on their shipment; for, the vessel may for this purpose be considered as the floating warehouse of the defendants—*Inglis v. Usherwood* (*k*), *Boghtlingk v. Inglis* (*l*), *Ogle v. Atkinson* (*m*). Where at the time an order for goods is given the mode of delivery is pointed out, a delivery according to that mode is clearly sufficient to take the case out of the statute.

2. The only promise charged in the fourth count is, a promise to pay the plaintiff for the nuts on delivery. The nuts were shipped under a bill of lading requiring freight to be paid before the delivery of the goods. It is, therefore, merely stated as a fact that the defendants were to pay the freight. The letter of M'Andrew & Sons com-

(*k*) 1 East, 515.

(*l*) 3 East, 381; 3 Esp. Rep. 58.

(*m*) 1 Marsh. 323; 5 Taunt. 759.

municates that as one of the terms of the order; but it is not alleged in the declaration as a condition to be performed as between the plaintiff and defendants. There is, therefore, no valid objection on the ground of variance. In *Elmore v. Kingscote*, the contract declared upon was a contract without price, and the evidence was of a contract at a stipulated price: the plaintiff, therefore, in fact, negatived his own contract: it was a clear case of variance.

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3. The plaintiff's right to recover under the common counts is substantiated by the evidence; for, the reasonable price of the nuts, and the usual shipping price at the port of Gijon, must be taken to mean one and the same thing.

4. The fact of the plaintiff's having re-sold the nuts upon the defendants' refusing to accept and pay for them, creates no obstacle to his recovering the value upon the count for goods bargained and sold. In those cases where it has been held that such an action will not in these circumstances lie, the re-sale evidenced the intention of the vendor to rescind the contract: as in *Hore v. Milner* and *Hagedorn v. Laing*. In *Mertens v. Adcock*, which was an action on the case for not taking away goods sold at a public auction, and for a loss on the re-sale, it was held that the plaintiff might recover on the count for goods bargained and sold; and that it was no objection to his right to recover on that count, that he had not the goods then to deliver in case he had a verdict. [Mr. Justice Alderson.—What is the nature of the contract? The count alleges that the plaintiff bargained and sold to the defendants certain goods, and it implies that he is ready to deliver them. How can he maintain such a claim as this, when, by his own act, he has deprived himself of the power to deliver the goods?] Where the goods are of a perishable nature, as in the present case, the law will imply an authority in the vendor to re-sell, in order to prevent the total destruction of the article: or, it may be, that, if there has been a perfect contract, the vendor, if he re-sell, will be

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liable as a wrong-doer. Besides, in selling the nuts, M'Andrew & Sons acted on their own account, and without any communication with the plaintiff: they were the charterers of the ship; and therefore, to prevent loss to themselves, necessarily unloaded the cargo. To hold a re-sale under such circumstances to be unauthorized and to operate in extinction of the original contract, will occasion great inconvenience.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The questions which have been argued before us arise upon two only of the counts of the declaration, the fourth special count, and the count for goods bargained and sold; for, as to the other special counts, it is properly admitted that they are not supported by the evidence produced at the trial; and the count for goods sold and delivered is clearly inapplicable to a case where the plaintiff has himself re-sold the goods before the action is commenced.

The objections taken on the part of the defendants to the right of the plaintiff to recover on the fourth special count are—first, that there is no sufficient memorandum or agreement in writing signed by the parties or their agents, to take the case out of the operation of the 17th section of the statute of frauds—secondly, that there is at all events a variance between the fourth count and the agreement produced at the trial in support of it. And, as to the count for goods bargained and sold, it is objected that the plaintiff has, by his own act in re-selling the goods before the action is brought, precluded himself from maintaining that form of action.

The only memorandum in writing on which the plaintiff relied at the trial is contained in a letter addressed by M'Andrew & Sons (who for this purpose we assume upon the evidence at the trial to have been the agents of both

parties lawfully authorized) to the plaintiff. That letter, which bears date the 29th July, 1832, contained the following passage—" We have transferred the Active to Messrs. Levy & Salmon, for whom you will load her in place of consigning her to us. They are to pay us for freight 120*l.*, and 10*l.* 10*s.* gratuity, which please insert in the bill of lading." It appears also from another part of the same letter, and we think quite sufficiently, that the Active was to be loaded with a cargo of nuts; so that the memorandum cannot be objected to on the ground that it is silent as to the *subject matter* of the contract. But the objection taken on the part of the defendants is, that no terms are specified in this memorandum *as to the price* at which the nuts were to be supplied to the defendants; and that there can be no sufficient contract for the sale of goods, unless *the price* forms one of the terms in the written memorandum. To this the plaintiff answers, that, if the memorandum imports, as it does, a contract for the sale by the plaintiff to the defendants of a cargo of nuts by the ship Active, as no price is stated to have been agreed upon, the law presumes the agreement to have been, or assumes as a condition of the contract, that the price was to be a reasonable one; so that the case must be considered as if the letter had itself contained an express stipulation that the agreement was for a sale at a reasonable price; and that, if the memorandum had contained such express stipulation, no doubt but parol evidence might have been admitted to shew the amount of such reasonable price. Whether, in all cases of an executory contract of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to price, by inferring that the parties must have intended to sell and to buy at a reasonable price, may be a question of some difficulty. Undoubtedly, the law makes that inference where the contract is *executed* by the acceptance of the goods by the defendant, in order to pre-

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vent the injustice of the defendant taking the goods without paying for them (*n*). But it may be questionable whether the same reason applies to a case where the contract is *executory* only, and where the goods are still in the possession or under the control of the seller. It appears, however, to us to be unnecessary to decide this question upon the present occasion; for, the fourth special count is framed upon an agreement that the plaintiff sold and the defendant bought the nuts, "at the then shipping price at Gijon, in Spain," to be delivered to the defendants on arrival in London, and to be paid for by the defendants on delivery: and that such was in fact the real contract between the parties was proved by the parol evidence at the trial. But such a contract is manifestly a very different one from that which is, as the plaintiff contends, to be inferred by law from the written memorandum. A contract to furnish a cargo at a reasonable price means such a price as the jury upon the trial of the cause shall under all the circumstances decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable, from accidental circumstances; as, on account of the commodity having been purposely kept back by the vendor himself; or with reference to the price at other ports in the immediate vicinity; or from various other causes. It is enough therefore to say that the contract set out in the fourth count is not a contract which is proved by any part of the letter of the 29th July; and that it is at variance with the terms which, as the plaintiff contends, ought to be imported into the written contract by operation of law. The present case, however, does not rest here. It was proved at the trial, by parol evi-

(n) See Mr. Serjeant Williams's second note to the case of *Webber v. Tivill*, 2 Wms. Saund. 121.

dence, that the actual bargain made was for a sale at the current price at the shipping port. This case, therefore, falls within the principle laid down by the Judges in *Cooper v. Smith* (o), and the decision in *Elmore v. Kingscote* (p), viz. that, where it is shewn by parol evidence that there has been an agreement for sale at a specific price, the plaintiff cannot, on producing a note in writing which is altogether silent as to price, recover on a count upon a sale on a quantum valebant.

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In the course of the argument on the part of the plaintiff, another point was adverted to, although not much relied on, viz. that there had been such an acceptance of these nuts by the defendants as to take the case out of the statute of frauds. But the criterion to be found in many of the cases as to acceptance or non-acceptance of goods sold is this—have the circumstances been such that the defendant has precluded himself from taking any objection to the quality of the goods sold. Here, it would be impossible to contend, that, merely in consequence of the packages being received on board the ship chartered by the defendants, they had obliged themselves to take them, if on their arrival they had appeared altogether unmarketable. We think, therefore, the nuts in question cannot be considered as having been accepted by the defendants; a question, indeed, which seems scarcely to arise upon a count where the breach is assigned for non-acceptance of the goods sold.

The ground upon which we determine that the plaintiff cannot recover on the fourth count will equally prevent his recovering on the count for goods bargained and sold for a reasonable price; for, in order to recover on that count, a sufficient note or memorandum of the contract of sale at a reasonable price is just as necessary as on the special count. But, for the reasons already given, the

(o) 15 East, 103. (p) 8 Dow. & Ryl. 343; 5 Barn. & Cress. 583.

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note produced cannot prove a sale at a reasonable price, where it is silent altogether as to price, and the parol evidence shews that a different contract was made. This ground of decision makes it unnecessary to decide the point whether the plaintiff can or cannot maintain the count for goods bargained and sold, after he has re-sold the goods to a stranger before the action brought—a question which does not go to the merits, but is a question as to the pleading only; for, there can be no doubt but that the plaintiff might after re-selling the goods recover the same measure of damages on a special count framed upon the refusal to accept and pay for the goods bought.

For the reasons above given, we think the rule for entering a verdict for the plaintiff must be discharged.

Rule discharged.

Friday,
Jan. 13th.

The patron of a benefice with cure of souls under the value of 8*l.* in the king's books, being also incumbent of the same benefice, accepted another with cure, and thereupon presented a clerk to the proper ordinary, who was afterwards admitted, instituted, and inducted, on his presentation, to the former living:—Held, that the first benefice thereby became actually

void from the time of presentation, within the meaning and provisions of the statute 28 Hen. 8, c. 11, and the succeeding incumbent entitled to the tithes from such presentation.

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THIS was an action of debt upon the statute 28 Hen. 8, c. 11, brought by the plaintiff as rector of the rectory of Stoke Lacy, to recover the value of tithes alleged to have been received by the defendant during the time of the vacation of the rectory.

The first count of the declaration stated, in substance, that, one Thomas Apperley, being rector of the rectory of Stoke Lacy, and also patron thereof, accepted, and was admitted, instituted, and inducted into the vicarage of the parish church of Ocle Prichard, the said rectory and the said vicarage being each of them a benefice with cure of souls, whereby it belonged to the said Thomas Apperley, so being patron thereof as aforesaid, to present, and thereupon

he did present the plaintiff to the then Bishop of Hereford (since deceased), the proper ordinary in that behalf, to be admitted, instituted, and inducted: whereupon the said Thomas Apperley thenceforth ceased to be either in fact or of right rector of the said rectory and parish church of Stoke Lacy, and by reason of the premises the same rectory and parish church became wholly vacant; that the said Thomas Apperley afterwards presented the plaintiff to the succeeding Bishop of Hereford, to be admitted, instituted, and inducted; and that the plaintiff was afterwards duly admitted, instituted, and inducted. The count then averred the plaintiff to be entitled to the value of the tithes taken by the defendant in the interval between the first presentation of the plaintiff to the rectory of Stoke Lacy, and his admission, institution, and induction under the second.

The second count, after stating the presentation of the plaintiff to the rectory of Stoke Lacy as in the first count, alleged that the said Thomas Apperley thenceforth ceased to be rector of the rectory and parish church of Stoke Lacy in fact or of right.

Pleas (to each count) "that the rectory of Stoke Lacy, at the times mentioned, was and still is a benefice with cure of souls below the yearly value of 8*l.*, according to the valuation thereof in the king's books."

General demurrer and joinder.

Mr. Serjeant *Stephen*, for the plaintiff.—The question here is, whether there has been a sufficient avoidance of the living of Stoke Lacy to entitle the plaintiff, the succeeding incumbent, to maintain an action for the profits arising during the vacation. In the late case of *Apperley v. The Bishop of Hereford* (*a*), this Court decided, that, although it did not appear upon the record that the first

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(*a*) *Ante*, Vol. 3, p. 102; 9 Bing. 681.

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living was of the value of 8*l.* a year or more in the king's books, still that the acceptance of a second incompatible benefice created such a vacancy as that quare impedit might be maintained against the bishop for refusing to present a clerk to such first living. It is clear, therefore, from that case that here is a vacancy in point of law. The pleas allege that the living of Stoke Lacy is under the value of 8*l.* in the king's books. That, however, is an immaterial allegation: the statute 28 Hen. 8, c. 11, provides indifferently for all cases, whether the living be under or above the value of 8*l.* (b). It will be contended, on the

(b) Section 1—"Forasmuch as in the statute of payment unto the king's majesty, &c., of the first fruits of spiritual promotions, &c. [26 Hen. 8, c. 3], express mention is not had ne made from what time the year shall be accounted in which the first fruits shall be due and payable to his highness, that is, to wit, whether immediately from the death, resignation, or deprivation of every incumbent, or from the time of admission or new taking of possession in every such promotion." Sect. 2. "And also by reason that in the same statute it is not declared who shall have the fruits, tithes, and other profits of the said benefices, offices, promotions, and dignities spiritual during the time of vacation thereof, divers of the archbishops and bishops of this realm have not only when the time of perceiving and taking of tithes, &c., hath approached, deferred the collation of such benefices as have been of their own patronage, but also have, upon presentations of clerks made unto them by the

just patrons, protracted and deferred to institute, induct, and admit the same clerks, to the intent that they might have and perceive to their own use the same tithes growing during the vacation; so that through such delays (over and above the first fruits which be justly due to the king's highness) they have been constrained also to lose all or the most part of one year's profits of their benefices and promotions, and to serve the cure at their and their friends' proper costs and charges, or utterly to forsake and give over their benefices and promotions, to their great loss and hindrance."

Section 3—"For reformation whereof, be it ordained and enacted, &c., that the said year in which the first fruits shall be paid to the king's grace shall begin and be accounted immediately after the avoidance or vacation of any such benefice or promotions spiritual afore rehearsed; and that the tithes, fruits, oblations, obventions, emoluments, commodities, rents, and all other whatso-

authority of *Halton v. Cove* (c), that, in order to entitle the plaintiff to recover in this action, there must be a vacancy in point of fact, as well as in law. The declaration, however, does expressly allege that the living of Stoke Lacy was in fact vacant; and this is admitted by the pleas.

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Mr. Serjeant Laddow, contra.—To entitle the plaintiff to maintain this action, he must aver in his declaration every fact necessary to bring the case within the provisions of the statute—Comyns's Digest, tit. "Pleader," (C), 22, 76—2 Rolle's Abridgment, 361. Whatever be the force of the canon law with respect to ecclesiastical persons, it has no operation whatever on laymen. In *Apperley v. The Bishop of Hereford* the question arose between an ecclesiastical patron and the ordinary, and therefore that case can have no application to the present. Upon the pleadings it must be taken that the living of Stoke Lacy was under the value of 8*l.* a year in the king's books. The

ever revenues, casualties, or profits, certain and uncertain, afferring or belonging to any archdeaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity, or office (charities only except) within this realm, or other the king's dominions, growing, rising, or coming during the time of vacation of the same promotion spiritual, shall belong and affere to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, and to his executors, towards the payment of the first fruits to the king's highness, his heirs and successors; any usage, &c., notwithstanding;

standing."

And by the 4th section it is enacted, that, if any archbishop, bishop, ordinary, or other person, to their uses or behoof shall take the fruits during vacation, and shall not, upon reasonable request made, restore them to the next incumbent being lawfully instituted, inducted, or admitted to the benefice, dignity, or office spiritual, or do let or interrupt the said incumbent to have the same, then every archbishop, bishop, ordinary, or other person so doing shall forfeit and lose the treble value of so much as he shall have received."

(c) 1 Barn. & Adolph. 538.

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declaration alleges a vacancy by cession of a benefice under the value of 8*l.* That is not enough to shew a vacancy *de facto*: and the defect is not aided by the subsequent allegation "that thereupon the said Thomas Apperley thenceforth ceased to be either in fact or of right rector of the said rectory and parish church of Stoke Lacy, and by reason of the premises the same rectory and parish church became wholly vacant." And, unless the former living was of the value of 8*l.* a year or more, the acceptance of the second did not by the statute render the first living void, but voidable only. In Watson's Clergyman's Law (*d*), it is said: "A church preferment is said to be void by cession, when the incumbent thereof doth take a second benefice that is incompatible. And, first, if an incumbent of a benefice with cure of souls doth take a benefice with cure—*Digby's case*, 4 Co. 79 *a*: in which case his first benefice was either of less or greater value than 8*l.* per annum; if of less value, yet, by his acceptance of a second with cure, it is at this day in jure void by the received canon law—*Evans & Ascough's case*, Latch, 243. And there needs not any sentence declaratory in the Spiritual Court to make way for the patron's presentation: for, he may immediately thereupon (without either deprivation or resignation) present a new incumbent to the said church, and require his admission." "But some opinions are, that the church is not void but by deprivation—5 Ed. 3, 9. Hen. 4, 37. 17 Ed. 3, 59; and that the taking of a second benefice with cure in such case, until deprivation, is no cession—*Godbolt*, 23. But this is to be understood to the disadvantage of the patron: that is, to the making of a lapse run from the cession, no notice being given to the patron thereof—*Armiger v. Holland*, Moore, 542. *Digby's case*, 4 Co. 79, and Jones, 104; for, until after such clerk is actually de-

(d) Ch. 2, p. 5.

prived of his first benefice, and notice thereof given to the patron, he (though he may) yet need not present: but then, after such deprivation, the church is void in *facto et jure*, so that he must at his peril present (*e*).” “In all cases when a former benefice is said, by the acceptance of a second, to be void by canon law only, before any deprivation, this is to be understood as to the patron, and for his advantage only; so that he may, if he please, present, &c.; but not as to strangers: for, if the clerk, before deprivation, doth sue for tithes of the first benefice, it is not any bar against him to say that he hath taken a second benefice; as was said, Trin. 13 Car., B. R., by Justice Barkley, which Justice Yelverton, in his argument in the case of *Prist* (*f*), said was so adjudged, Rolle's Abr. 2, 361 (*g*).” [Lord Chief Justice *Tindal*.—Watson, in a subsequent passage, throws doubt upon the authority in Rolle. He says (*h*): “But, had not the aforesaid authority resolved the contrary, it might have been a doubt whether such church had not been so void that the profits of it by this statute had belonged to the next incumbent from the time that the clerk had been instituted or otherwise entitled to the second benefice incompatible, and not from the time only of deprivation or judicial declaration of the avoidance in the Court Christian; for, the constitution of the Council of Lateran saith, *ipso jure sit privatus*, not speaking of any sentence of deprivation: and, by the same canon and words, a church shall be void to all purposes upon consecrating its incumbent a bishop, without any judicial proceedings, and particularly to the entitling the next incumbent to the profits of the vacation from the cession; which none dispute; why, then, should not the same canon have the same construction and effect in this case? Besides, it is said (10 Ed. 3, 1) that the constitution of Lateran is a general sentence of depriva-

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(*e*) Watson, p. 6.

(*f*) 1 Croke, 39.

(*g*) Watson, p. 8.

(*h*) Watson, c. 40, p. 404..

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tion; and that, if particular deprivation for a crime, or resignation of the incumbent, doth absolutely void a church, much more shall the constitution in the case do it." Here, the first clerk is also the patron, and he has presented: how could he afterwards sue for tithes of the first benefice?] The church can only be vacant in the terms of the statute, by the death, resignation, or deprivation of the prior incumbent: and here there is no avoidance by either of those modes; for, as to strangers, there can be no deprivation unless followed up by a judicial sentence; and no resignation until acceptance by the bishop: and the declaration neither alleges acceptance, admittance, institution, nor induction. Suppose the incumbent of the first living to have been deprived by the ordinary; he might appeal against the ordinary's decision; and pending the appeal the church would not be void: the church cannot be void before a final sentence of deprivation. The only operation of a presentment is, that it puts the patron in a course of having his clerk inducted; it is no deprivation: and it is not competent to a party by his own mere act to divest himself of an office—*The King v. Patterson* (i). The case of *Halton v. Cove* is not in any respect distinguishable from the present. There, the defendant, being incumbent of a living with cure of souls, valued at less than 8*l.* a year in the king's books, accepted another benefice, without having a dispensation to hold both, whereby the first became void *de jure*; but he continued in possession. The patron presented another clerk, and

(i) 4 Barn. & Adolph. 9. It was held that the acceptance by a person holding a corporate office, of another incompatible office not corporate, did not operate as an absolute avoidance of the corporate office, though it might be ground of a motion; and that acceptance of an incompatible office does not

operate as an absolute avoidance of a former office in any case where the party could not divest himself of that office by his own act and without the concurrence of another authority to his resignation or abdication, unless such authority be privy and consenting to the second appointment.

afterwards brought quare impedit, and recovered against the defendant; upon which the new presentee was instituted and inducted. In an action by the latter against the defendant, founded on the statute 28 Hen. 8, c. 11, s. 3, for the profits accruing during the vacation, it was held that the plaintiff could not recover the profits either from the time of his being presented, or from the suing out of the quare impedit, the vacation contemplated by the statute being a vacation de facto. Lord Tenterden, in delivering the judgment of the Court, after referring to the various sections of the statute, says (*k*): "Looking at the enactments here, it is impossible not to see that they are intended to meet the case of a living actually vacant, vacated either by death, by resignation, or by deprivation; and not to apply to a case at all like the present, where the living, although voidable, and perhaps actually void, yet *was not in fact vacant*, the rector still continuing in possession."

Mr. Serjeant Stephen, in reply.—The material distinction established by the case of *Halton v. Cove* is, between an avoidance in law and an avoidance in fact. In the present case it does sufficiently appear upon the face of the declaration that at the time of the plaintiff's presentation to the living of Stoke Lacy, the church was void de facto. By the 28th canon of the 4th council of Lateran, it is declared that—"Quicunq. recipere aliquod benefic' habens cur' animar' annex', si prius tale benefic' obtinebat, *eo sit jure ipso privatus*; et si forte illud retinere contenderit, alio etiam spoliatur. Is quoque ad quena prioris spectat donatio, illud post receptionem alterius conferat cui merito videret conferend' (*l*)."
And by the 9th sec-

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(*k*) 1 Barn. & Adolph. 558.

and Comyns's Digest, title "Es-

(*l*) Cited in *Wolferstan v. The Bishop of Lincoln*, 2 Wils. 174,

glise," (N), 5.

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tion of the statute 21 Hen. 8, c. 13, it is enacted, "that, if any person or persons having one benefice with cure of soul, being of the yearly value of 8*l.*, or above, accept and take any other with cure of soul, and be instituted and inducted in possession of the same, that then and immediately after such possession had thereof, the first benefice shall be adjudged in the law to be void;" and by section 10, "that it shall be lawful to every patron having the advowson thereof to present another, and the presentee to have the benefit of the same, in such like manner and form as though the incumbent had died or resigned; any licence, union, or other dispensation to the contrary thereof obtained notwithstanding: and that every such licence, union, or dispensation had or hereafter to be obtained contrary to this present act, of what name or names, quality or qualities soever they be, shall be utterly void and of none effect." It is clear, therefore, both from the canon above referred to and the statute 21 Hen. 8, c. 13, that the living of Stoke Lacy was absolutely void; and that no sentence of deprivation was necessary, even as regards strangers: and whether the defendant be a layman or a spiritual person makes no difference. *Halton v. Cove* does not decide that no case is within the statute unless the vacancy occurs by death, resignation, or deprivation: it only decides, that, to entitle the succeeding incumbent to the profits during vacancy, it must be a vacancy *de facto* as well as *de jure*. Admitting the first living here to be under the value of 8*l.* in the king's books, the allegation of presentation by the patron is conclusive. The presentation by him of another clerk, and his acceptance by the bishop, amount to a resignation. The avoidance must at all events date from the acceptance: and it is too late now to object that the acceptance is not alleged on the record; for, an objection that the plaintiff's title is defectively set forth, can only be taken on special demurrer; after pleading over

the defendant cannot take an objection to any defect that would be aided by verdict—*Bolton v. The Bishop of Carlisle* (*m*), *Fowle v. Welch* (*n*), *Fletcher v. Pogson* (*o*).

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—This was an action of debt brought by the plaintiff as rector of the rectory of the parish church of Stoke Lacy, to recover the value of certain tithes growing and arising within the said parish, which had been taken and received by the defendant to his own use during the time of the vacation of the said rectory. The plaintiff, in the first count of his declaration, stated, in substance, that one Thomas Apperley, being the rector of the rectory, and also the patron thereof, accepted, and was admitted, instituted, and inducted into the vicarage of the parish church of Ocle Prichard, the said rectory and vicarage being each of them a benefice with cure of souls, whereby it belonged to the said Thomas Apperley, so being patron thereof as aforesaid, to present, and thereupon he did present the plaintiff to the then Bishop of Hereford (since deceased), the proper ordinary, to be admitted, instituted, and inducted: and the declaration then stated in terms, “that the said Thomas Apperley thenceforth ceased to be, either in fact or of right, rector of the said rectory and parish church of Stoke Lacy, and by reason of the premises the same rectory and parish church became wholly vacant.” The count then proceeds to allege that the said Thomas Apperley afterwards presented the plaintiff to the succeeding bishop of Hereford, to be admitted, instituted, and inducted; and that the plaintiff was afterwards duly admitted, instituted, and inducted;

(*m*) 2 Hen. Blac. 259.

(*o*) 5 Dow. & Ryl. 1; 3 Barn.

(*n*) 2 Dow. & Ryl. 133; 1 & Cress. 192.
Barn. & Cress. 29.

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and then claims the value of the tithes taken by the defendant to his own use in the interval between the first presentation of the plaintiff and his admission, institution, and induction under the second. To this count there was a plea, "that the rectory of Stoke Lacy, at the times mentioned, was and still is a benefice with cure of souls below the yearly value of 8*l.*, according to the valuation thereof in king's books:" to which plea there is a general demurrer and joinder. There was a second count in the declaration, which, after stating the presentation of the plaintiff to the rectory of Stoke Lacy, as in the first count, alleges directly "that the said Thomas Apperley thenceforth ceased to be rector of the rectory and parish church in fact or of right:" to which the subsequent pleadings are the same as to the first count. And, although it was contended in the course of the argument, that, this direct allegation being admitted by the course of the pleadings, there was an end to any question whether the church was vacant or not; yet, inasmuch as it may be fairly contended that such allegation, though direct in point of form, is no more in substance than a legal inference or conclusion from the facts stated in the same count, we think it better to found our judgment upon the general question raised upon the whole record.

The question raised appears to be this:—The patron of a benefice with cure of souls under the value of 8*l.* in the king's books, being also the incumbent of the same benefice, accepts another benefice with cure, and thereupon presents a clerk to the proper ordinary, who is afterwards admitted, instituted, and inducted on his presentation—is the first-mentioned benefice to be considered vacant within the meaning of the 28 Hen. 8, c. 11, from the time of the presentation to that benefice, or from the time of induction only?

The general object of the statute 28 Hen. 8, c. 11, was, as is stated in the preamble, to supply a defect in the

former statute, 26 Hen. 8, c. 5, wherein express mention and declaration had not been made "from what time the year shall be accounted in which the first fruits shall be due and payable to his Majesty, whether immediately from the death, resignation, or deprivation of every incumbent, or from the time of admission or new taking of possession in every such promotion." The three instances mentioned in the preamble are introduced only to shew the nature of the vacancy intended, not to restrain the operation of the act to these three particular cases: for, the union of two livings (a case that will be afterwards more particularly adverted to), and the cession of a living, where the incumbent is created a bishop, are instances where the former living is as absolutely void, and the vacancy is as much a vacancy in fact without any further act done to complete the avoidance, as in the three cases specifically adverted to in the preamble. When, therefore, the statute afterwards proceeds to enact generally "that the same year in which the first fruits shall be paid to the King's Grace shall begin and be accounted immediately after the avoidance and vacation of any such benefice," and "that the tithes and other profits growing, arising, or coming during the time of vacation shall belong and affere to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, towards the payment of the first fruits to the King's Highness;" the manifest object of the statute is, that, in all and every case where there is a complete avoidance of a benefice, and consequently a vacation in fact, the tithes shall belong to the successor from the date of such avoidance, in order to enable him to pay the first fruits, the year of which payment is declared to commence from the same point of time. The mischief intended to be remedied was, that of the bishops and others at that time deferring to collate to benefices, or to institute clerks presented to them, for an unreasonable time, to the intent that they might take to their own use the tithes

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growing during the vacation. The act, therefore, as well on account of its being a remedial act, as on account of the general words of the enactment, ought to have a liberal construction, and to be made to comprehend every case that falls within the mischief; and at all events ought to have such construction as that the tithes which arise in vacation, within the proper meaning of that term, shall be payable, in every case, either to the former or the succeeding incumbent. The question therefore is, when does the vacation of this benefice commence. The law as to the avoidance of a former benefice by the acceptance of a second with cure, may be considered with reference to three cases—first, where the former benefice is of the value of 8*l.* or above in the king's books—secondly, where the former benefice is below the value of 8*l.*, and the incumbent of the former living is not also the patron, but is a separate and distinct person—thirdly, where the former benefice is below the value of 8*l.*, but the incumbent of the former benefice is at the same time the patron of it. And it may be convenient to see how the law stands with respect to the two former cases, before we come to the consideration of the third case, which is the case actually before the Court.

As to the first case, the rule of law is clear, upon the construction of the statute 21 Hen. 8, c. 13. By the 9th section of that statute, it is enacted "that, immediately upon the possession of the second benefice, the first benefice shall be adjudged void;" and again, by section 10, "that it shall be lawful for the patron thereof to present another, as if the incumbent had died or resigned." In such case, therefore, it is clear, that, upon the possession of the second benefice, the first becomes actually vacant; that the incumbent is out of possession of the first by the operation of the statute, without any sentence of deprivation, as if he were dead or had resigned; and that the former living is void *de facto*, not only as to the patron, who is

bound to take notice of the avoidance from the time of the induction to the second living, but also with respect to strangers, such as the parishioners, who might plead the induction to such second living as an answer to any demand for tithes by the former incumbent accruing subsequently to his acceptance of the second living.

As to the case secondly above put, it is equally clear, that, where the former living is below the value of 8*l.*, and the incumbent has accepted a second benefice with cure, so far as the patron is concerned, the former benefice is not absolutely void, but voidable only at the election of the patron. It is so far void that the patron may present another to it if he will, and the ordinary may admit and institute upon such presentation: but, if the patron will not present, no lapse shall incur until there is a sentence of deprivation as to the first benefice, and notice thereof has been given to the patron. This was resolved in *Holland's* case (*p*), and in *Digby's* case (*q*), and often before. In such a case, therefore, it would be clear that the provisions of the statute 28 Hen. 8, c. 11, would not apply until actual deprivation: for, notwithstanding the acceptance of the second benefice, the first benefice is full, as to strangers, until deprivation; the first incumbent, notwithstanding his acceptance of the second living, having the power to sue for and recover the tithes until actual deprivation, according to the authority of Mr. Justice Yelverton, as given in *Rolle's Abridgment* (*r*).

But the case now before the Court is one where the person who presents to the first benefice is at the same time both patron and incumbent; where the act of presentation is not an act done by a stranger without notice to him, the patron; but is the act of the individual patron himself. And we think that circumstance so far distin-

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(*p*) 4 Rep. 75.

(*q*) 4 Rep. 78.

(*r*) 2 Roll. Abr. 361.

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guishes this from the case last considered that it makes the first benefice actually void from the time of such presentation, within the meaning and the provisions of the statute 28 Hen. 8, c. 11, by rendering any sentence of deprivation altogether unnecessary and inapplicable. The distinction between the two cases may, perhaps, be more clearly seen by considering, first, how the rights of the individual who is at once the patron and incumbent of the first benefice are affected as patron; secondly, how the rights of the same individual are affected as incumbent. Now, the sole ground upon which it has been held in all the decided cases, that, where the first benefice with cure is less than 8*l.* in the king's books, the acceptance of a second by the incumbent makes the former voidable only, not void, as against the patron, is this, that the avoidance not being by the common law or by any statute, but by the canon law only, the patron is not bound to take notice of the institution and induction to the second living, to which act he is a stranger, until it is followed up by actual sentence of deprivation, and notice thereof to him. But this ground necessarily fails where the patron is himself the person who accepts the second living and afterwards presents to the first; for, it would be absurd and unreasonable that he should set up the want of notice of his own immediate act. And this appears to be consistent with what is found in the treatise intituled "Doctor and Student" (s), the author of which, after stating, that, if the voidance be by resignation or deprivation, the six months shall begin from the time the patron has notice of the resignation or deprivation (whether he may have actual knowledge of it or not), proceeds to say, that, in case of an union, which is also a cause of voidance—"There can be no union made, but the patrons must have knowledge; and it must be appointed who shall present after such

union; that is to say, one of them, or both, either jointly or by turn one after another, as the agreement is upon the union; and sith the patron is privy to the avoidance, and is not ignorant of it, the six months shall be accounted from the agreement." Now, the case of an actual presentation by the patron to the living of which he was also the incumbent, falls precisely within the same reason; and the living, as to him, must be absolutely void; and the six months' term for lapse must commence from the time of such presentation. In fact, he has already done that which every patron has a right to do; he has elected to consider it void, without a sentence of deprivation, by making his presentation in the first instance. But, secondly, if the first living is actually void as to him in his character of patron, from the date of his own act of presentation, how can it be otherwise than void as to him in his character of incumbent; that is, as to all the rights between him and his parishioners? It would seem a strange and unreasonable distinction, that, when the living is void as to a man in one character, that of patron, in consequence of his own voluntary act of presentation, the same living should be full as to the same individual in another character, viz. that of incumbent. And that such cannot be the case will appear from considering the nature of a presentation, and how far it is binding on the patron when once made. The form of the presentation, which is an instrument in the nature of a letter missive by the patron to the bishop, expressly alleges "that the benefice is then vacant." And the better opinion in the books appears to be that the king only can revoke a presentation when once made; no lay patron has the power to do so; all the books agreeing that he cannot do so after induction (*t*), but that the utmost the lay patron can do is to vary his presentation, by offering another clerk to the bishop, out of whom the

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(*t*) See Dyer, 348, and the cases cited in Watson, p. 225.

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bishop may choose which he pleases. In the case of an ecclesiastical patron, the rule is still more strict; for, he can neither revoke nor vary (*u*). And, although it may be too much to contend that the circumstance of the patron in this case being a clergyman brings him within this rule, which seems rather to apply to the case of a right of presentation belonging to an ecclesiastical person in right of his ecclesiastical preferment; yet it is enough for the present argument to shew that he has no general power to revoke, but that the clerk whom he has once presented to the bishop must still be submitted to the bishop's choice, though the patron may add another. The effect, therefore, of such a presentation to the first benefice where the clerk has been subsequently instituted and inducted under it, appears to us to be, that the former incumbent can never contend that the living was not vacant in point of fact at the time he so presented; that, in case he should sue for the tithes which grew and arose subsequently to his presentation of the new incumbent, he would fail in his suit; and that the payment of the tithes to the successor is a good and valid payment. And if this be so, the case appears to us to fall within the remedy intended to be given by the statute: for, otherwise, the mischief would follow which was intended to be prevented by that act, viz. that the tithes which grew and arose since the presentation would neither be claimable by the preceding nor succeeding incumbent, but would fall either to the ordinary or to the parishioner himself—the very consequence which the statute intended to prevent.

In the course of the argument on the part of the defendant, reliance was placed on the judgment of the Court of King's Bench in the late case of *Halton v. Cove* (*x*). It will be sufficient to say that the judgment given by us is not inconsistent with the judgment in the case referred

(*u*) *Latch, Rep.* 191, 254.

(*x*) 1 *Barn. & Adolph.* 538.

to. The Court of King's Bench held on that occasion that the statute applies to the case of a living actually vacant, and that it could not apply to the case then before the Court, where the living was not in fact vacant, *the rector still continuing in possession*. But the distinction appears to us to be, that, in this case, the incumbent does not appear to have continued in possession; but, on the contrary, upon this record, which alleges the presentation to have been made by him as patron, we must intend, that, as against him who has stated the living to have been actually vacant, the living was vacant, by his ceasing to be in possession both in fact and in law. There is no occasion to advert to the decision of this Court in the late case of *Apperley v. The Bishop of Hereford*, because it turned upon a point wholly collateral to the present.

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On the whole, we think the first benefice became actually vacant from the time of the presentation made to the same, and that the plaintiff is consequently entitled to the tithes in question from that time, under the statute 28 Hen. 8, c. 11; and we therefore give judgment for the plaintiff.

Judgment for the plaintiff.

**REX v. THE SHERIFF OF ESSEX, in a Cause of LEVY v.
PAIN.**

*Monday,
Jan. 13th.*

A CAPIAS against the defendant in this cause had issued into the county of Middlesex, and an alias capias afterwards issued into Essex, in which county the arrest took place. The defendant having (erroneously according to the then practice) put in bail in the last-mentioned county,

The 5th rule of
Trinity Term,
1 Will. 4, which
prohibits the
changing of bail
without leave of
the Court or a
Judge, applies
to the case of
bail put in by

the sheriff for the purpose of rendering the defendant.

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an attachment issued against the sheriff of Essex for not bringing in the body, on the ground that no bail had been put in in the county into which the writ had issued. The Court in the last term stayed the proceedings on this attachment, but directed it to stand as a security (*a*).

Mr. Serjeant *Merewether*, on a subsequent day in the same term, moved that the attachment might be set aside, on payment of costs, the sheriff having put in new bail and rendered the defendant.

Mr. Serjeant *Wilde*, contra, objected that the bail had been changed without leave of the Court, in violation of the rule of Trinity Term, 1 Will. 4, s. 5 (*b*), and therefore that the substituted bail were not competent to render.

Mr. Serjeant *Merewether*, in support of his rule, submitted that it was obvious, from the four preceding rules, that the rule in question was only intended to apply to bail put in by the party, and not to bail put in by the sheriff for the purpose of rendering.

PER CURIAM.—In *Stroud v. Kenny* (*c*), Mr. Justice Taunton decided that this rule applied to bail for prisoners in custody, and rejected bail who had been changed without leave. Besides, it was not necessary to change the bail in order to render the defendant; for, by the 20th rule of Hilary Term, 2 Will. 4, it is provided that bail, though rejected, may render the principal without entering into a fresh recognizance. In the present case there has been no render at all. The sheriff must, therefore, be content to take such terms as he can get.

Rule refused.

(*a*) Vide ante, Vol. 3, p. 870.

(*b*) 5 Moore & Payne, 815.

(*c*) Jervis's Rules, 3rd edit., p. 28, n.

THE motion was renewed on this day. But the Court said, that, unless a case decided in one of the other Courts upon the point could be produced, they could not interfere.

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M'KENZIE v. M'LEOD.

Tuesday,
Jan. 14th.

THIS was an action on the case brought to recover compensation for the accidental destruction by fire of a house in Scotland, which had been let by the plaintiff to the defendant. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster, after the last term. The facts were as follow:—The defendant hired the house in question of the plaintiff for one year, at the rent of 300*l*. An inventory of the furniture was made out and signed by the respective parties; and at the bottom of it was the following memorandum—"All which the said Donald M'Leod promises to re-deliver on his removal from the premises." The defendant, on taking possession of the house, agreed to retain some of the servants. The housekeeper's room, which adjoined the kitchen, was under the care of Catherine Clark, one of the servants of the plaintiff who had been retained by the defendant. The chimney of this room smoking, Clark told the cook that she would cleanse it by setting light to furze and straw in the chimney. The cook cautioned her as to the danger

The defendant hired of the plaintiff for one year a house situate in Scotland, together with the furniture therein. An inventory of the furniture was made out and signed by both parties. At the bottom of this inventory was a memorandum by which the defendant engaged to redeliver to the plaintiff at the end of the tenancy the articles enumerated. During the tenancy, one of the defendant's servants, finding that one of the chimnies smoked, in order to cleanse it, set light to some

furze and straw therein, in consequence of which the house was consumed, with a portion of the furniture. In an action brought by the plaintiff to recover compensation for the loss, an advocate who was called to prove what was the law of Scotland on the subject, stated, that, by the common law of Scotland, if a house was burned down through the negligence of a servant of the tenant whilst in the performance of an act that is within the ordinary scope of the servant's duty, the tenant is liable to the landlord for the loss so occasioned; otherwise not: and that, if furniture be let with a house, it is the same thing whether there be a special contract to restore it or not; for that no special contract is necessary in order to compel him to redeliver it at the end of the tenancy. The learned Judge who tried the cause told the jury, that, if they thought that the injury complained of was the result of an unauthorized act, an act not falling within the scope of the servant's duty, the defendant was not liable, either in respect of the house or the furniture. The jury having found a verdict for the defendant—The Court refused to grant a new trial.

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of such a proceeding; but notwithstanding she proceeded to put in practice her intention. The consequence was that the soot igniting set fire to the chimney, and the fire communicating to the timbers, the house and furniture were partially destroyed. It was proved that the chimney in question had recently after the defendant's entry been swept by the mason, who, it appears, is the proper person to perform such work in that part of the country; and that Clark was aware of this fact.

Mr. Stoddart, an advocate, who was called for the purpose of proving the Scotch law as applicable to the question, stated, that, by the common law of Scotland, if a house be burned down through the negligence of a servant of the tenant whilst in the performance of an act that is within the ordinary scope of the servant's duty, the tenant is liable to the landlord for the loss so occasioned; otherwise not: and that, if furniture be let with a house, it is the same thing whether there be a special contract to restore it or not; for that no special contract is necessary in order to compel him to re-deliver it at the end of the tenancy. His Lordship left it to the jury to say whether or not the facts proved brought the case within the Scotch law, as proved by the learned advocate: and he told them that they were to consider whether the fire originated in mere accident, and whether it was occasioned by an act of the servant that fell within the course of any particular or any general employment—in which case their verdict must be for the plaintiff; but that, if the injury was the result of an unauthorized act, an act not falling within the scope of the servant's duty, the master was not liable, and the verdict must in that case be for the defendant: and he said that the defendant's liability was precisely the same both as to the house and the furniture. The jury returned a verdict for the defendant.

Mr. Serjeant *Wilde* now moved that this verdict might

be set aside and a new trial had, on the grounds of misdirection, and that the verdict was against the evidence.—The proper question at the trial was, whether or not the act imputed to the servant was an act done by her in the common and ordinary course of her service. The evidence given by the learned advocate as to what the law of Scotland is upon the subject, amounts to nothing more than this, that, in order to render the master liable for the consequences of an act done by his servant, it must be an act that is done in the course of the service. Here, the act that gave rise to the damage was an act done by the servant in furtherance of her duty; she was proposing (though, as the event proved, indiscreetly,) to attain an object that clearly was within the scope of her duty, viz. the lighting of the fire. The defendant was, therefore, liable for the consequences, according to the statement of the Scotch law by Mr. Stoddart. In the case of *Lord Keith v. Keir* (a), where a person employed by the defendant to clear certain land of furze, contrary to the express orders of his master, used fire for the purpose, which communicated with and destroyed a plantation belonging to the plaintiff, the Scotch Court held the defendant liable for the damage. [Mr. Justice Alderson.—That seems to be a very strange decision: it makes a man responsible for an act done in disobedience to his express orders].—Then, with regard to the furniture—the defendant was at all events bound, in virtue of his special contract, to restore the articles mentioned in the inventory at the end of the year: he clearly would have been liable to this extent had he hired the furniture alone, without the house. In *Bul-*

(a) Faculty Decisions, Vol. 13, p. 679—June 10th, 1812. And see *Payne v. Walker*, Fac. Coll. May 30th, 1811 — *Swinton v. M'Daughal*, Fac. Coll. Jan. 16th, 1820—*Hardie v. Black, Morrison's*

Decisions, 10,133—*Dr. Sibbald v. Lady Rough*, Id. 13,976—*Sutherland v. Robinson*, Id. 13,979—*Hamilton v. Baird*, 4 Shaw & Dunlop's Decisions, 790—*Hathorn v. Linwood*, 3 Bligh, 194.

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lock v. Dommet (b), the assignees of a lease whereby the lessee covenanted for himself and his assigns absolutely to repair the premises without qualification, is bound to repair, notwithstanding they are destroyed by fire.

Lord Chief Justice TINDAL.—It appears to me that there is no reason for sending this cause down to a second trial. The grounds upon which a new trial has been moved for, are—first, that the direction to the jury upon the question as to the defendant's liability as to the house was erroneous—secondly, that the furniture, being the subject of an express contract between the parties, at all events stood on a different footing from the house. With regard to the house, the way in which I left the question to the jury was, in substance, whether the accident was occasioned by an act done by the servant within the scope of her authority or employment. The jury found that it was not. It has been contended, that, inasmuch as the object of the servant was to light a fire, an act clearly within the scope of her employment, we must also take it that the means she employed to effect that object was so likewise. It appears, however, from the evidence, that the object of the servant was not merely to light the fire, but to cleanse the chimney; for, she had previously apprised the cook that such was her intention. There is clearly a broad distinction between such an act and any service that this person was in the ordinary course of things bound to render to her master. She herself was fully aware that cleansing the chimney was no part of her duty, for, shortly after the defendant entered into possession of the house, the chimnies had been swept by the proper persons. I am unable, therefore, to reconcile to my mind, that, where the servant appears to have had a definite intention to

(b) 6 Term Rep. 650; 2 Chit. Rep. 608. And see *Digby v. Atkinson*, 4 Camp. 275.

cleanse the chimney, she was acting in pursuance of her service: and this seems to me to afford a sufficient answer to the objection as to the mode in which the question was left to the jury. Then, with regard to the special agreement, we are told that by the Scotch law the case would stand precisely on the same foundation with or without a special contract; and there was no evidence offered on the other side to shew that the special agreement made any difference in the case. With respect to the English law, it is to be observed that a tenant is not bound to rebuild a house destroyed by fire, unless there be a special contract to render him liable to that extent, as where he has covenanted to keep the premises demised in repair, and to deliver them up in the like condition at the end of his term. Here, upon the evidence, we find that by the law of Scotland, the defendant's special agreement to restore the furniture in good condition on the expiration of his tenancy, imposes upon him no greater degree of responsibility than the law had already clothed him with. Why, then, should we give to the agreement between the parties a larger interpretation than is recognized by the law of the country in which the transaction took place. It seems to me that it never could have been intended that so important a liability as that of making good the damage resulting from the accidental destruction of the furniture by fire, should by this contract be imposed upon the party. The case of *Caggs v. Bernard* (c), upon the Roman law, which is the foundation of the Scotch law, shews this is not a case in which the defendant ought to be held responsible. Lord Chief Justice Holt there decides the hirer of goods to be responsible only where the borrower is. "As to the third sort of bailment, scilicet, locatio or lending for hire; in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is

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expired. And here again I must recur to my old author (Bracton) fol. 62. b. *Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.* From whence it appears, that, if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses: and, if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case if the goods are stolen." That case shews that our own law puts certain limits to the responsibility of the hirer in a case like the present.

Mr. Justice PARK.—It seems to me that this case was properly submitted to the jury. The main question was whether the act done by the servant was done in the course of a particular service, or fell within the scope of her general employment. This was a question of fact to be ascertained by the jury. They found that the cleansing of the chimney was not within the general scope of the servant's duty: and I think properly. It was the duty of the servant to give notice of the state of the chimney, in order that the proper means might be resorted to for the purpose of clearing it. With regard to the case cited of *Lord Keith v. Keir*, I am of opinion that that decision was contrary to law, as it is repugnant to good sense and justice. The master there expressly prohibited the act which caused the damage: it was very strange to hold him liable under such circumstances.—Then, as to the special contract touching the furniture, it seems, that, according

to the Scotch law, as stated on the trial by Mr. Stoddart, the special contract created no greater degree of responsibility in the hirer than the law itself would without any agreement impose on him; and that therefore the house and the furniture stand precisely on the same footing.

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Mr. Justice BOSANQUET.—I am of the same opinion. The question was left to the jury consistently with the statement of the law of Scotland on the subject, as given in the testimony of the advocate. The question was one of fact—mere matter of evidence. Where an injury of this nature arises from unavoidable accident, the master is not liable: where it is occasioned by the negligent performance of an act of the servant within the scope of either a particular or a general employment, there the employer is liable. The jury returned a verdict for the defendant on the ground that the injury was occasioned by an act in no respect within the line of duty of the servant. Does it follow from the evidence that this finding is wrong? The servant was undoubtedly employed to light the fire. But it did not appear that it was a part of her duty to sweep the chimney, or even to cause it to be cleansed. The mode resorted to for the purpose, too, was one which no person of common sense could be supposed for a moment to sanction: and it appears that the girl was cautioned by another servant in the establishment. Upon this point, I think the jury have come to a right conclusion.—The only remaining question is as to the furniture, and the agreement to restore at the expiration of the tenancy the articles mentioned in the inventory annexed to it. No doubt persons may by a special contract extend their liability beyond that which the law itself puts upon them. But here the advocate was not asked whether this memorandum varied the case from the general law of Scotland upon the subject. He stated simply, that, by the common law of Scotland, if a house

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be burned down through the negligence of a servant of the tenant whilst in the performance of an act that is within the ordinary scope of the servant's duty, the tenant is liable to the landlord for the loss so occasioned; otherwise not: and that, if furniture be let with a house, it is the same thing whether there be a special contract to restore it or not; for that no special contract is necessary in order to compel him to redeliver it at the end of the tenancy. If the stipulation means no more than the Scotch law would infer, it has no operation on the present case. The question therefore is, whether we are to construe the memorandum as importing an engagement to do more than the Scotch law requires from a party under such circumstances; or whether it means more than to point out the several articles that are to be restored at the end of the term—that is, whether it means any thing more than that the defendant thereby engages to re-deliver the furniture under the like conditions with his engagement to deliver up the possession of the house. I think there is no ground for disturbing the verdict.

Mr. Justice ALDERSON.—I am of the same opinion. The first question is whether the verdict which has passed upon the direction of the Lord Chief Justice is correct or not. The jury were told that the defendant was not liable unless the injury was occasioned by an act done by the servant within the general scope of her duty. Such was stated by the learned advocate who was called at the trial to be conformable with the law of Scotland. The question therefore was one of fact, whether the act done by the defendant's servant was within the general scope of her duty: the principle being, that, where an act is done by a servant in the course of the performance of his duty, the law will construe it to be the act of the master. A servant's duty may be defined by special orders, or there may be a discretion given to the servant touching the mode of doing a thing. In the first of these cases, the act of

the servant is the act of the master; in the second, the exercise of judgment by the servant is an exercise of the judgment of the master. But, where the master has neither given special directions as to the manner of doing a thing, nor given the servant a discretion on the subject, I am at a loss to see how the act of the servant can be held to be the act of his master. Suppose in the present case the servant, instead of setting fire to the chimney, had removed part of the brick-work, which she conceived to cause an obstruction in the chimney, and so damaged the fabric, would the defendant have been liable? That, I admit, is an extreme case. But there are intermediate cases, and this is one, in which the question is purely for the consideration of the jury: and I cannot say that they have determined it wrong; I cannot say that the act in question was an act done under the direction of the defendant, or in the exercise of any discretion reposed by him in his servant.—Upon the second point, I understand the evidence of the learned advocate to amount to this, that the special agreement as to the furniture carries the defendant's liability no further than the law of Scotland would infer without it. On that point also I think the direction of his Lordship was accurate. The furniture stands on the same footing with the house.

Rule refused (a).

(a) See Hargreave & Butler's Co. Litt., Vol. 3, note 377.

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 M'KENZIE
^{v.}
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1834.

Thursday
Jan. 16th.

A declaration for a penalty (consisting of one count only) concluded "to the damage of the plaintiff of 100*l.*" The defendant demurred specially, assigning for causes this and another ground. The plaintiff entered a nolle prosequi as to the damages. A Judge at Chambers ordered the nolle prosequi to be set aside:—The Court supported the order.

BUTLER v. MAPP.

THIS was an action brought by the plaintiff to recover a penalty of 100*l.* alleged to have been incurred by the defendant by an infraction of the statutes 25 Geo. 2, c. 36, and 28 Geo. 2, c. 19, passed for the regulation of places of public entertainment. The declaration consisted of one count only, which concluded "to the damage of the said plaintiff of 100*l.*" The defendant demurred, assigning for causes, that it did not appear whether the plaintiff sued in person or by attorney; and that, in suing for a penalty, which accrued only on bringing the action, the plaintiff could have sustained no damage by the previous detention. The plaintiff joined in demurrer, and entered a nolle prosequi as to the damages: whereupon, on an application by the defendant to Mr. Justice Vaughan, at Chambers, that learned Judge ordered that the nolle prosequi might be set aside, and at the same time gave the plaintiff leave to amend his count on payment of costs.

Mr. Serjeant *Stephen*, on a former day, obtained a rule nisi to set aside the order of the learned Judge.—He cited *Milliken v. Fox* (*a*).

Mr. Serjeant *Wilde* now shewed cause.—The order of the learned Judge is unexceptionable. The right of a plaintiff to enter a nolle prosequi under circumstances similar to the present has frequently been discussed. In *Rose v. Bowler* (*b*), where the cause of demurrer to the declaration was that the counts were improperly joined, it was held that the plaintiff could not enter a nolle prosequi as to some and leave the others remaining. So, in *Drum-*

(*a*) 1 Bos. & Pull. 157.

(*b*) 1 Hen. Blac. 108.

mond v. Dorant (c), it was held, that, after demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, the plaintiff could not enter a nolle prosequi as to that count, and proceed on the other. The rule is thus laid down by Mr. Serjeant Williams (d): "In many cases a nolle prosequi may be entered in actions against *one defendant only*. As, where he pleads the general issue to part, and a special justification, or demurs to the residue, the plaintiff may enter a nolle prosequi to either of the pleas—*2 Roll. Abr. 101(G)*, pl. 1. *2 Leon. 177.* Hob. 180. *Slowley v. Evely*, Lilly's Entries, 448. Clift's Entries, 425, pl. 14. So, where there are several *issues* joined between the plaintiff and defendant, the plaintiff may enter a nolle prosequi to one or more of the issues joined, and proceed to trial upon the others—*Reg. Plac. 190*, s. 5. So, where there are *several counts* in the same declaration, and the defendant demurs to one count, and pleads to issue to the other, the plaintiff may enter a nolle prosequi as to one count, and proceed upon the other—Lilly's Entries, 55. So, if the defendant's plea be a bar to one of the counts, as where assumpsit is brought for goods sold and delivered, and there is also another count upon an account stated, if the defendant pleads infancy to the whole, this is a complete bar to the count upon the account stated—*1 Term Rep. 40*, *Trueman v. Hurst*; but the plaintiff may set the declaration right by replying to the first count, and entering a nolle prosequi to the other. Indeed, if the defendant demurs to a declaration *because* there are improper counts in it, the plaintiff shall not be permitted to cure this defect by a nolle prosequi to the improper counts—*Rose v. Bowler*. For the same reason, if the defendant demurs *for any imperfection or informality* in any of the counts, the plaintiff shall not be allowed to enter a

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(c) 4 Term Rep. 360. (d) 1 Wms. Saund. 207 a; and see Id. 285, n.(5).

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nolle prosequi to such counts—*Drummond v. Dorant*.” In *Bertram v. Gordon*(e), where it was held, that, after demurrer to one count of a declaration, the plaintiff may enter a nolle prosequi on that count, and proceed to trial on his other counts—the Court said: “In the cases of *Rose v. Bowler* and *Drummond v. Dorant*, the defendant does away the ground of the demurrer to the whole declaration, in which there was a misjoinder of counts, by striking out one part, to which, if that part stood by itself, there was no objection. The only objection was, that it was mixed with the other: the case is widely different from this.”

Mr. Serjeant *Stephen*, in support of his rule.—In the case of *Milliken v. Fox*, which was decided subsequently to all those relied upon on the other side, this Court refused to allow the defendant to strike out a nolle prosequi entered by the plaintiff as to one of the counts of his declaration, after it had been demurred to. *Rose v. Bowler* was a case of misjoinder. *Drummond v. Dorant*, and the opinion of Mr. Serjeant Williams founded upon it, also have reference to a question of misjoinder. In such cases, it may be admitted that the plaintiff cannot by entering a nolle prosequi remove the ground of demurrer. Here, the declaration consists of one count only, and it claims the penalty and damages for its detention. There is no sensible distinction between the case of a declaration containing several counts, and that of a single count containing several demands: the true point is whether or not there be a distinctness of demand in the declaration; the principle is precisely the same whether the demurrer be to two counts, or there be two causes of demurrer in one count. In *Cuming v. Sibley*(f) a judgment for damages for the detention of the debt in an action on the bribery act(g) was reversed on error.

(e) 6 Taunt. 444; 2 Marsh. 144.

(g) 2 Geo. 2, c. 24.

(f) 4 Burr. 2489.

Lord Chief Justice TINDAL.—In this case the objection raised on the part of the defendant goes to the whole of the plaintiff's demand. By his declaration the plaintiff claims the debt and damages for its detention. The defendant demurs specially, shewing that the entire declaration is wrong. I am unable to distinguish the case from that of a demurrer to a declaration containing two or more counts, on the ground of a misjoinder. In the cases cited, where the objection goes to the whole declaration, it has been held that the plaintiff shall not be at liberty to take away the ground of the defendant's argument, by entering a nolle prosequi in order to cure the objection. I cannot distinguish those cases from the present. In *Milliken v. Fox*, the declaration contained several counts, and the demurrer applied to one of them only. Here, however, the plaintiff proposes to give up part of a count, that which relates to the damages. This, as it seems to me, sufficiently distinguishes the two cases. It would be manifestly unjust to allow the plaintiff to withdraw, and thus throw the costs upon the defendant, who has properly urged the objection. I cannot dismiss the case without expressing the disapprobation of the Court at the great and unnecessary length of the affidavits filed in support of the rule: on that ground I think the rule should be discharged with costs.

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Mr. Justice PARK concurred.

Mr. Justice BOSANQUET.—The only hesitation that I have entertained in this case arose from the case of *Milliken v. Fox*: but my Lord Chief Justice has clearly distinguished that case from the present. There the plaintiff abandoned the count objected to. Here, the demurrer is not on account of a misjoinder, as in *Rose v. Bowler* and *Drummond v. Dorant*: but it goes to the whole count; and the plaintiff seeks to remove the objection by giving

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up a part. The regularity of the nolle prosequi in this case is not at all affected by the late statute (*h*) which provides, that, "where any nolle prosequi shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to and have judgment for and recover his reasonable costs in that behalf (*i*)."

Mr. Justice ALDERSON.—I am also of opinion that the present case falls within that of *Rose v. Bowler*, and not within *Milliken v. Fox*. In principle it is a case of misjoinder: the plaintiff has put in his count two things which could not properly be joined. He cannot now be permitted to strike out the objectionable part.

Rule discharged with costs (*k*).

(*h*) 3 & 4 Will. 4, c. 42, s. 33.

(*i*) In *Cooper v. Tiffin*, 3 Term Rep. 511, it was held that a defendant against whom the plaintiff enters a nolle prosequi, is entitled to his costs, by virtue of the stat. 8 Eliz. c. 2, s. 2.

(*k*) A nolle prosequi may be as to *part of the same count*—1 Wms. Saund. 107 b, n. (2). As, where in trespass the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a nolle prosequi as to the hay and grass, and proceed for taking the corn. This was done in *Wiggleworth v. Dallison*, reported in Doug. p. 190, though this point is not noticed in the printed report. The declaration contained several counts; the fifth was for breaking and entering the plaintiff's close,

and with feet in walking, treading down the grass and corn, and with cattle eating up other the grass and corn, and with wheels of carts subverting the soil, and taking and carrying away the hay, and mowing and carrying away other the grass and corn, and converting thereof. The sixth count was for seizing, taking, and carrying away the plaintiff's hay, grass, and corn, and converting thereof. The defendant pleaded not guilty and liberum tenementum. The plaintiff, as to all the trespasses in the fifth count except as to the mowing, taking, and carrying away the corn, and as to the seizing, taking, and carrying away the hay and grass in the sixth count, and converting thereof, entered a nolle prosequi, and took issue on the rest.

1834

EMERY and MIDDLETON v. THOMAS MUCKLOW.

THIS was an action of replevin for seizing goods alleged to belong to the plaintiffs as trustees named in a deed whereby all the effects of one James Mucklow were conveyed to the plaintiffs in trust for his creditors. The defendant avowed for 460*l.* rent in arrear, due from James Mucklow; and also claimed the goods as belonging to himself and another, as assignees under a commission of bankrupt issued against James Mucklow on the petition of the defendant.

At the trial before Mr. Justice Park, at the last Assizes for the county of Warwick, it appeared that the debt upon which the commission issued was claimed to be due by virtue of a promissory note given by James Mucklow to the defendant on the 2nd of January, 1826, payable on demand. This note was more than six years old, and there was no evidence to take it out of the statute of limitations. A verdict having been found generally for the defendant—

Mr. Serjeant *Wilde*, in the course of the last term, obtained a rule calling on the defendant to shew cause why a verdict should not be entered for the plaintiffs on the issue raised on the title of the assignees, on the ground of the insufficiency of the debt to support the commission.

Mr. Serjeant *Adams* now shewed cause.—The balance due for rent, after deducting the value of the goods, was of itself a sufficient debt to support the commission. [Lord Chief Justice *Tindal*.—If the defendant had brought an action for the rent, he clearly could not at the same time make it the foundation of a petitioning creditor's debt.] There is a manifest distinction between the case of a replevin and an action for rent. Suppose, instead of a replevin, the goods had been sold under the distress, and

Friday,
Jan. 17th.

In replevin, the defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record—The Court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees.

Sembly, that, pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant founded on his demand for rent.

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MUCKLOW.

the landlord's claim satisfied to the extent of the proceeds, would not the balance form a good petitioning creditor's debt? By distraining, the party makes no election beyond the value of the goods.

Mr. Serjeant *Wilde*, in support of his rule.—Whilst the distress was pending, the defendant issued a commission of bankrupt against James Mucklow, the tenant, founded upon the debt claimed to be due on the note. By defending the replevin, he claims the goods as landlord; and by his avowry he also alleges them to be the property of the assignees under that supposed commission. Suppose there had been no note, and the defendant had distrained for rent, how would he have shaped his affidavit in order to procure the commission—the value of the goods not being ascertained at the time?

Lord Chief Justice *TINDAL*.—The only question here in point of fact is, whether or not the defendants shall pay the costs of the issue raised on the title of the assignees. It appears to me, that, having succeeded on the issue raised on the avowry for rent in arrear, and obtained a return of the goods, the defendant cannot be permitted to set up the title of third persons to the same goods. That would be a manifest contradiction on the face of the record. On that ground, therefore, I think the verdict should be entered for the plaintiffs on the issue taken on the title of the assignees.

The rest of the Court concurring—

Rule absolute.

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COWELL v. BETTELEY.
SAME v. SNOW and OTHERS.

Saturday,
Jan. 25th.

BY an order of Nisi Prius these two causes and all matters in difference between the respective parties were referred to an arbitrator, who was to decide for whom and for what amount the verdicts were to be entered; the costs to abide the respective events. The first action was trover; the second, in which Betteley was substantially the sole defendant, was an action on the case for an excessive distress. The arbitrator directed a verdict to be entered for the plaintiff in the first cause—damages 100*l.*; and in the second, for the defendants: he then found that the plaintiff was indebted to Betteley in the sum of 86*l.* 11*s.* 6*d.*, which sum, *together with the costs of the defendants in the second action, he directed to be set off against the damages and costs in the first action.*

Mr. Serjeant Wilde, on a former day, on behalf of the plaintiff's attorney, obtained a rule calling on the defendants to shew cause why so much of the award as directed the 86*l.* 11*s.* 6*d.* and the costs of the second action to be set off against the damages and costs in the first, should not be set aside.—He submitted, that, by the terms of the reference, the arbitrator had no authority to give any directions as to the costs; and that the plaintiff's attorney had a lien on the verdict in the first action for the amount of his costs: and he referred to the 93rd rule of Hilary Term, 2 Will. 4 (a), which provides that “no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular

that the set-off could not be allowed to the prejudice of the plaintiff's attorney's right of lien upon the damages and costs in the first action, for his costs therein.

The lien of the attorney cannot be affected by a reference of the cause and all matters in difference between the parties.

Two causes and all matters in difference between the respective parties were referred by an order of Nisi Prius; the costs to abide the event. The arbitrator directed a verdict to be entered for the plaintiff in the first cause, with 100*l.* damages, and for the defendant in the other. And he further found that the plaintiff was indebted to the defendant in the sum of 86*l.* 11*s.* 6*d.*, which sum together with the costs of the second action he directed should be set off against the damages and costs in the first:—Held, that the case was within the 93rd rule of Hilary Term, 2 Will. 4, and consequently

(a) Ante, Vol. 1, p. 429; 8 Bing. 303.

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BETTELEY.

suit against which the set-off is sought;" and to the case of *Hunsted v. Kidd* (*b*), where it was held that an arbitrator under a rule of reference which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set-off against the costs of a prior cause, although all matters in difference are referred (*c*).

Mr. Serjeant *Jones* now shewed cause.—The question is, whether, under the circumstances, the arbitrator had a right in this case to direct a set-off of the 86*l.* 11*s.* 6*d.* and the costs of the second action against the damages and costs in the first, to the extent of affecting the lien of the attorney for the plaintiff in the first action. Before the rule of Hilary Term, 2 Will. 4, it is perfectly clear, that, if A. had recovered a judgment with costs against B., and B. had also recovered a judgment with costs against A., in this Court, the respective judgments might be set off without regard to the attorney's lien—a right which the Court had always held to be subordinate to the equitable rights of the parties. And the rule was the same where there had been a reference; for, in *Figes v. Adams* (*d*), it was held, that if, upon the reference of an action in this Court, the arbitrator award the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off, without motion. The provision that the costs should abide the event, was merely introduced for the protection of the parties. Unless therefore the case be within the new rule, the motion must fail. The only object of that rule was, to assimilate the practice of the Court of Common Pleas to that of the King's Bench, which before were at variance. The agreement of the parties, entered into with the consent of their respective attor-

(*b*) 1 Chit. Rep. 526.

(*c*) But the award is not to be set aside entirely, but only for

that part which is incorrect—*Id.*

Ibid.

(*d*) 4 Taunt. 632.

nies, gives the arbitrator the equitable right of arranging between them, without reference to the claims of the attorneys. The case of an arbitration never could have been intended to be embraced by the rule: the question is, what was the intention of the parties in entering into this convention.

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BETTELEY.

Mr. Serjeant *Wilde*, in support of his rule.—By submitting to an arbitration, the parties merely substitute the arbitrator for the Judge and jury; leaving those rights of the respective parties which are not made the subject of the reference to their legal consequences: the arbitrator has no power to alter those rights. Here, by the very language of the reference, the question of costs is taken out of the arbitrator's discretion. The arbitrator has affected to deal prospectively with a matter that could not arise until after his functions had ceased: the parties had no opportunity of being heard on the subject of the set-off.

Lord Chief Justice TINDAL.—It appears to me to be unnecessary on the present occasion to decide whether or not the arbitrator had power to award a set-off in the manner he has done as between the parties. If, however, he had not done so, the Court would. But the question is, whether the *jus tertii*—the right of the plaintiff's attorney—is to be governed by this act of the arbitrator, notwithstanding the rule of Hilary Term, 2 Will. 4, s. 93, or whether this case be out of the operation of that rule; in other words, whether the Court will uphold the award, and so defeat their own rule. It appears to me that the rule in question must govern this case. It is clear, that, if there had been no reference to arbitration, the parties could not by agreement between themselves deprive the attorney of his lien for costs. Can they, then, by submitting the matters in difference to an arbitrator, effect this

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object? I think not. The words of the rule are very general—"No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought:" not even with the parties' consent; and what higher authority can an arbitrator have than that which the consent of the parties gives him? I therefore think that this rule applies as well to a case where the cause has been referred, as to where it has been in the ordinary course pursued to its legal result. The Court of Exchequer, in the case of *Hambleton v. Higginbottom* (e), held that rule to be inflexible, and applicable to all cases. The Court are however desirous not to set aside the award, but only to protect the lien of the attorney. The rule will therefore be, that execution may issue for the costs of the first action, notwithstanding the award.

Rule absolute accordingly.

(e) Hilary Term, 1832—Jervis's Rules, 3rd edit. p. 69, n. (g).

Thursday,
Jan. 30th.

The plaintiff and defendant were joint owners of a ship. At the end of a voyage, an account was made out of the receipts and disbursements, and the balance ascertained and paid. One of

the items for which credit was given to the defendant in the account, consisted of a sum due from the partners to their broker, which sum the defendant undertook to pay. The defendant neglecting to discharge this debt, the plaintiff was arrested and compelled to pay it:—Held, that he might recover the amount from the defendant as money paid to his use.

WILSON v. CUTTING.

THIS was an action brought by the plaintiff to recover a sum of 62*l.* 5*s.* alleged to have been paid by him to the use of the defendant, under the following circumstances:—The plaintiff and defendant were joint owners of a certain vessel. In the month of June, 1832, an account was settled between them on the termination of a voyage, on which occasion credit was given to the defendant for the above

sum of 62*l.* 5*s.*, which the plaintiff and defendant owed to one Burnett whom they had employed as a broker, and which sum the defendant had undertaken to pay to Burnett. The account being thus adjusted, a balance of 24*l.* 6*s.* remained in favour of the plaintiff: that sum was paid to him by the defendant, and he gave a receipt for it. The defendant neglecting to pay Burnett the 62*l.* 5*s.*, the latter arrested both the plaintiff and defendant, whereupon the plaintiff paid the demand, and now sought to recover it from the defendant.

At the trial before Mr. Justice Gaselee at the Sittings in London on Monday last, it was submitted on the part of the defendant that the plaintiff under the circumstances was not entitled to recover, on the authority of a case of *Sadler v. Hinckman* (*a*), where, on an adjustment of accounts, one partner having taken upon himself to pay a particular debt, and failed to do so, the other was arrested and compelled to pay it; and it was held that he could not maintain an action at law against his copartner in respect of such payment. The learned Judge intimated an opinion that, the account for the voyage being settled, and the transaction closed, the plaintiff was not by law precluded from suing for the present demand. The jury returned a verdict for the plaintiff—damages, 62*l.* 5*s.*: but the learned Judge gave the defendant leave to move to enter a nonsuit.

Mr. Serjeant Goulburn now moved accordingly.—Before a party can be entitled to bring an action in respect of a claim arising out of a partnership account, there must be a final balance struck. In *Fromont v. Coupland* (*b*), the plaintiff and defendant had been engaged in running a coach from B. to L., the plaintiff finding horses for one

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(*a*) K. B. Michaelmas Term, (*b*) 2 Bing. 170; 9 J. B. Moore, 4 Will. 4, not yet reported. 319.

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part of the road, and the defendant for another; the profits of each party were calculated according to the number of miles his horses travelled; and the plaintiff received the fares, and gave an account weekly of the receipts and disbursements of the coach: it was held that the plaintiff and defendant were partners, and that, in an action by the former against the latter upon a separate transaction, the defendant could not set off a balance which had been declared in his favour upon such weekly accounts. [Lord Chief Justice *Tindal*.—After the final settlement in this case, as evidenced by the receipt, there was no joint fund remaining. Mr. Justice *Park*.—Suppose there had been a general settlement at the end of each voyage; in such case the partnership quoad hoc would be at an end, according to the case of *Owston v. Ogle* (c). There, part owners of a ship having agreed “each and every of them with the others and each and every of the others,” that the ship should proceed on a certain voyage under the exclusive management and control of one of them as ship’s husband; and that, after his return, “a full account should be made of the said ship and her concerns,” and the net profits be divided in proportion after deducting all charges: it was held that the duty of making out such account was cast upon the ship’s husband, and for not doing so, and not dividing the net profits, after deducting all charges, within a reasonable time after the ship’s return, an action lay against him upon the agreement by each of the part owners.] The whole extent to which the authorities go is this, that one partner is liable to an action at the suit of another where there has been a final settlement of accounts between them, and a balance ascertained: but that, if either party has failed in an engagement to pay a particular item, the other cannot sue in respect of that omission.

Lord Chief Justice TINDAL.—I am of opinion that the

(c) 13 East, 538.

rule applied for ought not to be granted ; and the ground of my opinion is this—the plaintiff and defendant, being partners for a voyage, at the termination of it settled and adjusted the account as to the voyage; and in that account the defendant charged himself with this sum of 62*l.* 5*s.*, which he undertook to pay the broker; and, in consequence of his so charging himself with that sum, the balance due on the settlement to the plaintiff was considerably diminished. It was an agreement between them that the sum in question should be taken out of the partnership account. When, therefore, the plaintiff paid it, he had as just a right to demand it of the defendant as if they had never been partners at all.

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Mr. Justice PARK.—I am of the same opinion. My Brother Gaselee under the circumstances did right to give the defendant leave to move. But there is in fact nothing in the case. Joint owners of a vessel do not stand in quite the same position with regard to their rights and liabilities to each other as general partners do. The final settlement of the account brings this case clearly within *Owston v. Ogle*.

Mr. Justice ALDERSON.—There is no difference in principle between this case as it at present stands, and if the plaintiff, instead of merely allowing the 62*l.* 5*s.* in the account, had given the defendant the money to pay the broker, and the latter had failed to do so.

Mr. Justice GASELEE.—I entertained no doubt at the trial; and, but for the case said to have been decided on the subject in the Court of King's Bench in the course of the last term, I should not have reserved the point.

Rule refused.

1834.

*Friday,
Jan. 31st.*

A writ of capias was issued against the defendant upon an affidavit sworn before and filed with the deputy filacer for Sussex. The defendant not being found in Sussex, the plaintiff caused an alias capias to be issued into Cornwall by the same officer, he being also deputy filacer for that county:—Held, that no new affidavit of the cause of action, or office copy of that already sworn, need be filed on issuing the alias.

In an affidavit to hold to bail, the defendant was described as “J. S., of Bath, in the county of Somerset, Esq.”—Held, sufficient.

In an action by husband and wife, administratrix, on a bond given to the intestate, it is no objection to the affidavit to hold to bail that the defendant is alleged to be indebted to the husband and wife, administratrix; or that the affidavit omits to state that the deceased died intestate, or to whom the sum mentioned in the condition is made payable—the same degree of precision not being required in an affidavit as in a declaration.

**COPPIN and Wife, Administratrix of J. PLURA, deceased,
v. POTTER.**

THE affidavit upon which the defendant was held to bail in this cause stated that the defendant was indebted to Coppin and his wife, administratrix of John Plura, deceased, in the sum of 1,455*l.* for principal and interest due on a bond for 2,400*l.* made by the defendant to the said John Plura, and conditioned for the payment of 1,200*l.* The deponent was described as “of Bath, in the county of Somerset, Esq.”

This affidavit was sworn on the 13th September, 1833, before the deputy filacer for the county of Sussex, and duly filed with him; and a writ of capias thereupon issued against the defendant directed to the sheriff of Sussex. The defendant not being found in Sussex, the plaintiff filed with the same officer a praecipe for an alias capias to be issued into Cornwall, he being also deputy filacer for that county. The first writ expired on the 14th instant; the second, upon which the defendant was arrested, issued on the 17th. The praecipe disclosed the day of filing the affidavit upon which the capias issued, and also the date of such first writ. No second affidavit, nor any office copy of the former one, was filed on issuing the second writ.

Mr. Serjeant *Wilde*, on a former day in this term, moved that the defendant might be discharged out of custody, on filing common bail, on the grounds, that there was no affidavit to warrant the issuing of the second writ, and that the affidavit filed with the filacer for Sussex on the issuing of the first writ was defective.—With regard

to the first objection—Where both writs are issued by the *same filacer* no new affidavit or copy is necessary. But here the filacers are different, though both happen to transact their business at the same office, and by the same deputy. The party has a right to find the affidavit by virtue of which the writ is issued against him in the office of the filacer for the county where he is arrested. This was admitted by the Court in the late case of *Richards v. Stuart* (*a*).—The second objection resolves itself into four.—1. The affidavit contains no sufficient addition of the deponent, or description of his place of abode—“Bath in the county of Somerset,” is much too general.—2. The affidavit states the defendant to be indebted to the *plaintiff* and his wife, administratrix, &c.; whereas the plaintiff takes no interest in the debt; he merely joins for conformity—*Beamond v. Long* (*b*).—3. It omits to state that John Plura died intestate, according to the usual form. [Lord Chief Justice *Tindal*.—That objection is much too nice: the same particularity is not required in an affidavit to hold to bail as in a declaration (*c*).]—4. It states the bond to have been conditioned for the payment of 1,200*l.*, without stating *to whom*. A bond given to A. payable to B. would not warrant an affidavit that the debt was due to A. [Lord Chief Justice *Tindal*.—To whomsoever the money mentioned in the condition is payable, the action must be brought by the obligee (*d*).]

The rule was granted upon the first objection, and upon the two first points of the second, but refused upon the others.

Mr. Serjeant *Talfourd*, on a subsequent day, shewed cause.—The officer before whom the affidavit was sworn,

(*a*) *Ante*, Vol. 3, p. 778; 10 *Bing.* 322. (*c*) See *Ridley v. Williamson*, 1 *Lord Raym.* 636.

(*b*) *Cro. Car.* 208, 227; *Sir W. Jones*, 248. (*d*) See *Byland v. King*, 1 *J. B. Moore*, 24; 7 *Taunt.* 275.

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and by whom the two writs were issued, being the deputy of the filacers for both Sussex and Cornwall, the affidavit that has been made and filed of the plaintiff's cause of action is a sufficient compliance with the statute 12 Geo. 1, c. 29, s. 2 (e). In *Boyd v. Durand* (f), it was held, that, if a plaintiff proceed by a second original writ of capias, instead of a testatum capias, a second affidavit to hold to bail, or an office copy of the first, is not necessary. There, as here, the deputy filacer for the two counties was the same. Sir James Mansfield said:—"With respect to the practice of filing an office copy of the affidavit, it is a singular one, and it may deserve consideration whether the practice is proper of suing out a writ of capias alike into two counties, instead of pursuing the old common law practice of suing out a testatum capias. The act of parliament never contemplated this practice, and therefore could not provide for it: no rule of Court or law requires an office copy to be filed in the second county; it is consonant indeed to the spirit of the act of parliament that there should be one; but *the deputy filacer for both counties is the same*, and it cannot much affect the justice of the case that he reads the affidavit in the character of filacer for Middlesex rather than in the character of filacer for Surrey. If the old practice were adhered to, all difficulty on this point would be avoided." In *Anderson v. Hayman* (g), where the arrest was held irregular, the two writs were issued by different officers. [Mr. Justice Alderson.—How could perjury be assigned upon this affidavit?] As a writ of capias issued into Sussex, by the deputy filacer for which county the affidavit was taken, the offence of perjury would be complete. In *Martin v. Bidgood* (h), a capias into Cambridgeshire issued on an affidavit filed

(e) Amended by the 5 Geo. 2, c. 27, and made perpetual by the 21 Geo. 2, c. 3.

(f) 2 Taunt. 161.

(g) 2 J. B. Moore, 192; 8 Taunt. 242.

(h) 12 J. B. Moore, 236; S. C. nom. *Evans v. Bidgood*, 4 Bing. 63.

with the filacer for that county: a testatum capias into Devonshire afterwards issued before the return of the capias, without a new affidavit or an office copy of the original affidavit; *the same officer being filacer for both counties*—the Court refused to set aside the testatum. Mr. Justice Park there said (*i*): “I agree with the decisions in *Anderson v. Hayman* and *Dorville v. Whomwell* (*k*); but those cases are distinguishable from the present, inasmuch as in both the second writ was a new capias instead of a testatum. Here, the testatum was correctly issued; for, the filacer for Cambridgeshire is the proper officer for issuing writs into Devonshire.” And Mr. Justice Gaselee also said that the objection was answered by the fact that the affidavit had been filed with the proper officer. In *Richards v. Stuart* (*l*), the defendant was arrested under a writ of capias issued into London, and discharged out of custody on the ground of a defect in the process. At the time of making the rule absolute for discharging the defendant, the Court gave the plaintiff leave to arrest him again. The plaintiff thereupon caused a second writ to be issued into London: it was held that it was not necessary to file a second affidavit of debt on issuing the second writ—the two writs being issued by the same officer, with whom an affidavit of the cause of action had been duly filed on the issuing of the first writ. From all these authorities it is clear, that, where the second writ

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(*i*) 12 J. B. Moore, 240.

(*k*) 10 J. B. Moore, 318; 3 Bing. 39. On an affidavit of debt sworn before and filed with the filacer for Middlesex, a capias ad respondendum issued to the sheriff of that county against the defendant, who not being found there, an office copy of the affidavit certified by the filacer for Middlesex was filed with the fila-

cer for Yorkshire; on which *another capias* was issued into the latter county, instead of a testatum; whereupon the defendant was arrested: it was held that this was irregular, as a fresh affidavit should have been sworn before and filed with the filacer for Yorkshire.

(*l*) Ante, Vol. 3, p. 778; 10 Bing. 322.

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is a continuance of the first, and both are issued by the same officer, no second affidavit is necessary. Here, both writs were issued by the same deputy filacer, though acting for different counties; and the second writ was clearly a continuance of the first—it was issued within the time allowed by the statute for suing out an alias (*m*); and the praecipe filed with the filacer disclosed the day of filing the original affidavit, as well as the date of the capias; the defendant therefore could sustain no inconvenience. The course adopted is precisely in accordance with the late rule (*n*), which orders “that any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county; the plaintiff in such case, upon the alias or pluries writ of summons, describing the defendant as *late* of the place of which he was described in the first writ of summons, and, upon the alias or pluries writ of capias, referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.”—Then, as to the objections to the form of the affidavit. It is said that the description of the deponent’s place of abode and his addition are not given with sufficient particularity. In the first place, it is to be observed, that, although there is a rule in the King’s Bench requiring the true place of abode and addition of the party making the affidavit to be inserted therein (*o*), yet there is no such rule in this Court (*p*). In *Vaissier v. Alderson* (*q*), however, it was held sufficient to describe the deponent as “of the city of London, merchant.”—It

(*m*) 2 Will. 4, c. 39, s. 10.

(*p*) See *Anonymous*, 6 Taunt.

(*n*) Michaelmas Term, 3 Will.

73.

4, s. 6—Ante, Vol. 2, p. 330; 9
Bing. 444.

(*q*) 3 Mau. & Selw. 165. And
see *Smith v. Younger*, 3 Bos. &

(*o*) Reg. 1, Mich. 15 Car. 2.
And see *Jarrett v. Dillon*, 1 East,
18. *Collins v. Goodyer*, 4 Dow.
& Ryl. 44; 2 Barn. & Cress. 563.

Pull. 550, where the addition of
“manufacturer” was held suffi-
cient.

is further objected that the debt is alleged to be due *to the husband* as well as to the wife. But the affidavit is in the form usually adopted, and is in accordance with *Cowell v. Watts* (r). If a bond be given to husband and wife, administratrix, the husband alone may declare on it as on a bond made to himself—*Ankerstein v. Clarke* (s). So, husband and wife may sue on a promissory note made to the wife during coverture—*Philliskirk v. Pluckwell* (t). “It is not necessary that the affidavit to hold to bail should be framed with all the precision of a declaration”—Per Lord Chief Justice Tindal, in *Buckworth v. Levi* (u).

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Mr. Serjeant Wilde, in support of his rule.—In *Richards v. Stuart*, the Court distinctly decided, upon a review of all the authorities, that, where the party is arrested by virtue of a second writ issued by the *same officer* with whom was filed the affidavit upon which a prior writ had issued, and by whom such prior writ was issued, no new affidavit or office copy need be filed. There, however, both the writs were directed to the same sheriffs: whereas, here, the affidavit is upon the file of the filacer for Sussex, and the praecipe for the writ upon which the defendant has been arrested is to be found upon the records of the filacer for Cornwall. Does the fact of the same individual being deputy for the filacers of the two counties, the accidental fact of the business of the two counties being transacted in the same office, make any difference? Suppose the filacer for Cornwall chooses to remove his office to another place, or to appoint a new deputy, will the fact of an affidavit appearing upon the file of the filacer for Sussex satisfy the words of the statute, and justify a writ appearing to have issued into Cornwall? Suppose an indictment for perjury upon this affidavit, would the proof

(r) 6 East, 405; 2 Smith, 410.

(u) 5 Moore & Payne, 23; 7

(s) 4 Term Rep. 616.

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(t) 2 Mau. & Selw. 393.

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be the same in respect of each writ? Certainly not. It is at least extremely doubtful whether an indictment could be maintained at all upon it. The intention of the act clearly was, that the officer who issues the process upon which the arrest takes place, shall have an affidavit sworn before *him* to justify its issuing. In *Ex parte Campbell* (*x*), Lord Eldon refused to receive under one commission of bankrupt a deposition made under another, doubting whether perjury could be assigned upon it. The principle of that decision applies here. In *Dalton v. Barnes* (*y*), it was admitted that the affidavit was not sworn before the proper officer, but it was contended that the practice was, for the filacer, upon transmitting to him either the original affidavit or an office copy of it, to issue his writ: but the Court said "that such could not be the practice, for that an affidavit made for one specific object could not be transferred to another; and perjury could not be assigned on the office copy." There is no case to be found in the books where a second writ into a different county has been allowed to be good without at least an office copy of the affidavit filed on the issuing of the first. In *Boyd v. Durand*, it appeared that the same person executed the office of deputy filacer for Middlesex and for Surrey, and that he had been instructed to file in Surrey an office copy of the affidavit upon which the writ into Middlesex had issued, and that he had been paid for it, but, through the urgent pressure of business, he had not been able to cause it to be copied and filed. *Anderson v. Hayman* is a decisive authority in favour of this application. There, on an affidavit of debt sworn before and filed with the filacer for Devon, a writ ad respondendum issued to the sheriff of that county against the defendant, who not being found there, an office copy of such affidavit was filed with the filacer for London, on which another writ issued, di-

(*x*) 2 Rose, B. C. 51.(*y*) 1 Mau. & Selw. 230.

rected to the sheriffs of London, under which the defendant was arrested: and it was held that this was irregular, and that an affidavit should have been sworn before the filacter for London. Mr. Justice Burrough said: "As the process on which the defendant was arrested issued in London, the affidavit should have been sworn there; and the mere filing of the office copy of the original affidavit is not sufficient." In *Beck v. Young* (*s*), Mr. Justice James Parke discharged the defendant out of custody on the ground that the affidavit upon which the writ of capias had been issued into Middlesex, was sworn and filed at the Bill of Middlesex office (*a*). The foundation of that decision must have been, that the writ had not been issued by the officer by whom the oath was administered.—The affidavit was sworn on the 13th September; the writ upon which the defendant was arrested did not issue till the 17th January. By the 10th section of the 2 Will. 4, c. 39, it is enacted that the writ shall continue in force four months and no longer: the same reasoning that applies to the writ, with equal force applies to the affidavit; and that having in this case been sworn more than four months before the issuing of the writ, did not properly authorize it (*b*).

(*s*) Not reported.

(*a*) Probably in that case the affidavit had been sworn *before* and the writ issued *after* the alteration in the practice effected by the uniformity of process act.

(*b*) In Tidd's Practice, 9th edit. p. 190, it is said: "An affidavit to hold to bail continues in force for a year; during which period the defendant may be arrested on the first or any subsequent process sued out thereon. But an affidavit made more than a year before the suing out of the writ is not sufficient to authorize an arrest in the King's Bench; for, the act re-

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quires an oath of a subsisting debt at the time of suing out the process; and, after a year, it will be presumed that the debt has been paid, if nothing appear to the contrary—*Collier v. Hague*, 2 Str. 1270; *Pitches v. Davy*, MS. Hilary, 44 Geo. 3; *Stewart v. Freeman*, MS. 47 Geo. 3, K. B.: but see *Crooks v. Holditch*, 1 Bos. & Pull. 176. It is therefore necessary that a new affidavit should be made before a writ is sued out, when *more than a year* has elapsed since the making of the former affidavit."

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The description of the deponent is clearly not so precise as the practice of the Court requires. The description of a "merchant" of the city of London, as in the case of *Vaissier v. Alderson*, is much more definite than the description here.

In point of law the husband has no interest in a debt due to the wife as administratrix. The affidavit is, therefore, incorrect in stating the debt to be due to the husband.—Wentworth's Office of Executors, 380—Rolle's Abridgment, title "Executors" (P.), pl. 3—10. Wentworth's Pleading, 458—*Curry v. Stephenson* (c). If husband and wife recover judgment for a debt due to the wife as executrix, and the wife die, the husband shall not have a scire facias upon the judgment, but the succeeding executor or administrator—*Beamond v. Long*. It is of extreme importance that the affidavit should accurately disclose the right and interest in respect of which the plaintiff sues.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the Court:—

The principal objection that has been urged in this case is to the issuing of an alias capias into Cornwall, there being only one affidavit of debt, and that being filed with the filacer for Sussex. It appears that the same individual fills the office of deputy filacer for both those counties: and it is contended, that, before issuing the writ into Cornwall, the officer should have had a new affidavit of the cause of action filed with him in his character of deputy filacer for that county, or at all events an office copy of the former affidavit. I confess I do not see much reason for the filing of an office copy, particularly where the

(c) 4 Mod. 376; Skin. 555; Salk. 421; Comb. 311; Cro. Eliz. 112 537; Latch. 212.

same officer acts for both counties. But, upon the construction of the statute 2 Will. 4, c. 39, and the rules of Court founded thereon, I am of opinion that this objection is not maintainable. The alias capias is placed upon the same footing as the testatum formerly stood. The 10th section of the statute enacts "that no writ issued by authority of that act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued *within one such calendar month after the expiration of the preceding writ*, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ, &c." The rules thereon (*d*) provide "that any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county; the plaintiff in such case, upon the alias or pluries writ of summons, describing the defendant as *late* of the place of which he was described in the first

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(*d*) Michaelmas Term, 3 Will. 4, ss. 6, 7. Ante, Vol. 2, p. 330; 9 Bing. 444.

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writ of summons, and, upon the alias or pluries writ of capias, referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed;" and then give the form of the alias. It appears, therefore, that, after the passing of this act and the promulgation of these rules, the only mode of continuing a writ of summons or capias into a second county, is by an alias, which writ is substituted for that which was before called a testatum. The only question therefore is, whether the writ issued into Cornwall in this case was in fact an alias and in continuance of the former writ. If the defendant intended to say that it was not an alias, why did he not produce the copy which, by the 4th section of the statute 2 Will. 4, c. 39, must have been given to him on his arrest. He has not however done so; but the præcipe for the second writ filed with the deputy filacer (which is annexed to the affidavit) shews that the plaintiff desired to have an alias capias into Cornwall in continuance of the writ formerly issued into Sussex. As, therefore, it appears from the clause in the statute above referred to, that the writ of capias is to continue in force only four months, but that it may within a month afterwards be continued by an alias capias; and as the capias in this case appears to have issued on the 13th of September, 1833, and the second writ therefore issued within the time allowed by law for the issuing of an alias; how are we to say that this was any other than an alias capias sued out in continuance of the preceding writ of capias? Consequently, the alias capias being given in substitution of the old testatum capias, the case of *Boyd v. Durand* must govern the present. There, the same individual filled the office of deputy filacer for the counties of Middlesex and Surrey; an affidavit to hold to bail having been lodged with the filacer for Middlesex, it was held that neither a new affidavit, nor an office copy of the old one, was necessary upon issuing a second writ against the defendant into the county of Surrey.

With respect to the second objection—that the affidavit on the face of it mis-describes the debt as being due to *the husband* and wife as administratrix—We think, that, whether the description be strictly accurate or not, seeing that the end is answered, we ought not to scan the affidavit with all the strictness that we should a declaration coming before us on special demurrer. The same answer may be given to the other point upon the affidavit.

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Rule discharged, without costs.

SKIPPER v. LANE.

Friday,
Jan. 31st.

IN this case a writ of fieri facias had been issued against the defendant on the 9th January, under which the sheriff had levied. The sheriff was on the 13th ruled to return the fi. fa. On the 18th he had notice that a fiat in bankruptcy was about to be sued out against the defendant. He afterwards returned that the goods remained in his hands for want of buyers; whereupon a writ of venditioni exponas issued; and on the 24th the sheriff was ruled to return the venditioni exponas. On the 28th the goods were claimed by the assignees; and on the 29th—

The sheriff having seized goods under a fi. fa., notice was given to him on the 18th January that a fiat was about to be sued out against the defendant; and on the 28th a claim was made to the goods by the assignees:— Held, that an application by the sheriff on the 29th, for relief under the interpleader act, was sufficiently prompt.

Mr. Serjeant *Andrews*, on the part of the sheriff, moved, under the interpleader act, that he might be relieved, and the disputed claim contested by the assignees and the execution creditor.

Mr. Serjeant *Wilde* now appeared on the part of the execution creditor to shew cause.—A sheriff who applies to the Court for relief under this act must come as soon as possible. He is bound to come as soon as he receives notice of an adverse claim; or, at all events, before taking

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any other proceeding. In *Cook v. Allen* (*a*), where goods were taken in execution by a sheriff, and, a claim being made to them, the sheriff was prevented from applying by a rule obtained by the defendant in the action for setting aside the proceedings for irregularity, which rule was not disposed of till the 23rd of January, when it was discharged—the Court of Exchequer held that the sheriff was too late in applying on the 31st of January, though he resided in Suffolk and the affidavit was sworn there on the 30th. Here, the sheriff had notice of the claim on the 18th, and made no application to the Court till the 29th, the day before he would have become liable to an attachment for not returning the writ of *venditioni exponas*. This was clearly too late.

Mr. Serjeant Andrews.—No definite or certain claim was made by the assignees until the 28th. The sheriff was not bound to attend to a mere intimation that a claim might possibly arise at some future indefinite time.

Mr. Serjeant Bompas appeared for the assignees.

PER CURIAM.—The imputed delay of eleven days can hardly be held to be such a delay as we can find fault with; particularly as the first notice was a mere notice of an expected claim (*b*).

Rule absolute (*c*).

(*a*) 2 Dowl. P. C. 11.

(*b*) There must be an *absolute* claim to goods, which may be followed by an action, before the sheriff is entitled to apply for relief under this act—*Isaac v. Spilsbury*, ante, Vol. 2, p. 341; 10 Bing. 3; 2 Dowl. P. C. 211.

(*c*) Before the sheriff applies to

the Court under the interpleader act, he is bound to inquire into the nature of the claim set up; and therefore, if he brings parties before the Court in consequence of a claim which is clearly bad in point of law, the Court will compel him to pay the costs—*Bishop v. Hinzman*, 2 Dowl. P. C. 166.

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DABBS v. HUMPHREY.

Friday,
Jan. 31st.

THIS was an action of assumpsit brought by the plaintiff to recover a balance of 30*l.* 9*s.* 9*d.*, alleged to be due upon a bill of exchange for 150*l.*, drawn by the plaintiff and accepted by the defendant, bearing date the 14th July, 1826, and payable two months after date. Plea, the statute of limitations. The cause was tried before Mr. Justice Alderson, at the last Assizes at Winchester. In order to rebut the presumption arising from the plaintiff's possession of the bill, that he was the *holder*, the defendant offered in evidence a draft of a declaration delivered in the year 1829, in an action upon a bill of exchange of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of one Cull, a bankrupt. The present action was commenced in 1833. In order to take the case out of the statute of limitations, the plaintiff gave in evidence the following letter, dated the 30th September, 1827, and addressed by the defendant to the plaintiff:—

“ Dear Sir,—I received yours, and I beg to say I cannot send you the 20*l.* I have no money by me now, nor shall I have till after our fair. Your better way will be to give up that bill which you hold, and draw another for 30*l.* 9*s.* 9*d.*, which will be the balance of the account; which shall be honoured when due. The interest of your money, and the interest of the 300*l.*, I will settle when I come to town. Draw the bill at two months, and I will accept it payable at Knott's.”

The jury thought that the balance spoken of in this

Assumpsit for the balance of a bill of exchange. Plea, the statute of limitations. In order to take the case out of the statute, a letter was given in evidence, written by the defendant to the plaintiff, in which the defendant said:—

“ I cannot send you the 20*l.* I have no money by me now, nor shall I have till after our fair. Your better way will be to give up that bill which you hold, and draw another for 30*l.* 9*s.* 9*d.*, which will be the balance of the account; which shall be honoured when due.”—Held, that this was a sufficient acknowledgment to take the case out of the statute; the jury having found that the balance spoken of in the letter related to the bill in question.

In an action on a bill of exchange (by drawer against acceptor), in or-

der to rebut the presumption arising from the plaintiff's possession of the bill, that he was the *holder*, the defendant offered in evidence a draft of a declaration delivered in the year 1829 in an action on a bill of exchange of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of a bankrupt:—Held, insufficient to call upon the plaintiff to shew how he became re-possessed of the bill in his individual character.

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letter related to the bill in question, there not appearing to be any other account between the parties: a verdict was accordingly returned for the plaintiff—damages, 30*l.* 9*s.* 9*d.*; leave being reserved to the defendant to move to enter a nonsuit, in case the Court should be of opinion that the above letter was not sufficient evidence of a new promise to take the case out of the statute.

Mr. Serjeant *Bompas*, in the last term, obtained a rule nisi accordingly.—He submitted that there was no evidence to go to the jury that the bill mentioned in the letter was the same as that for which the action was brought; and that, at all events, the letter did not amount to such an acknowledgment and promise to pay the supposed balance as would afford an answer to the plea—it being conditional only, upon the return of the original bill. He cited *Fearn v. Lewis* (*a*), *Haydon v. Williams* (*b*), and *Kennett v. Milbank* (*c*). He also contended that the circumstance of a former action having been brought on the same bill by the plaintiff in another character, which former action was not shewn to be at an end, cast upon the plaintiff the onus of giving evidence as to his being the bona fide holder.

Mr. Serjeant *Meredewether* now shewed cause.—The letter contains a clear acknowledgment of a debt, and a sufficient promise to pay it, to take the case out of the statute: the finding of the jury that the promise applied to the debt in question is conclusive. In *Fearn v. Lewis*, and also in *Haydon v. Williams*, the promise was conditional, to pay when of ability; and in *Kennett v. Milbank* the promise was made subject to a condition which had not been performed. There, the plaintiff produced at the

(<i>a</i>) 4 Moore & Payne, 1; 6 Bing. 163.	
Bing. 349.	(<i>c</i>) Ante, Vol. 1, p. 102; 8 Bing.
(<i>b</i>) 4 Moore & Payne, 811; 7	38.

trial a deed whereby the defendant had assigned to him and to one C. the whole of his property, in trust to secure 6*s.* 8*d.* in the pound to his creditors, in which deed was a recital that the defendant was indebted to the plaintiff and the other creditors whose names were thereunder written, in the several sums set opposite their respective names, in a schedule annexed to the deed. The deed also contained a proviso that "the deed and all the covenants therein" should be void, unless all the creditors signed by a given day. The deed was not executed by all the creditors; neither was the plaintiff's name or the amount of his debt inserted in the schedule; nor did he execute the deed: and yet this was relied on as a promise sufficient to take the case out of the statute. But the Court held otherwise. In *Dickinson v. Hatfield* (*d*), Lord Tenterden held, that if, since the statute 9 Geo. 4, c. 14, a defendant by letter admit a balance to be due, without stating the amount, this will take the case out of the statute of limitations; but, if the whole evidence be merely proof of the writing, and no proof of the original cause of action, the plaintiff can only recover nominal damages. And in *Lechmere v. Fletcher* (*e*), a promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt more than six years old, was held to be a sufficient compliance with the provisions of the 9 Geo. 4, c. 14, s. 1, to take the case out of the statute of limitations, though no amount is specified in the promise: and a plaintiff suing on such a promise is not confined to nominal damages, but may recover the whole of such proportion upon proving the amount by extrinsic evidence. These two cases are authorities to shew that the plaintiff would at all events be entitled to a verdict, even if no amount had been specified in the letter as the balance due.—The bill being pro-

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(*d*) 5 Car. & Payne, 46; 1 Mal-

kin & R. 141.

(*e*) 1 Cromp. & Meeson, 623;

3 Tyr. 450.

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duced by the plaintiff, it sufficiently appeared that he was the holder, and there was no evidence offered on the part of the defendant to rebut that presumption.

Mr. Serjeant *Bompas*, in support of his rule.—In *Machell v. Kinnear* (*f*), where a bill of exchange was, by the direction of the payee, indorsed in blank, and delivered to A., B., & Co., bankers, on account of the estate of an insolvent, which was vested in trustees for the benefit of his creditors—it was held that A. and B., two of the members of the firm, and also trustees, could not, conjointly with a third trustee who was not a member of the firm, maintain an action against the indorsee, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise. Here, the evidence at the trial shewed that the plaintiff and another had possession of the bill in the year 1829 as assignees of Cull; and there was nothing to shew how it got back to the plaintiff's hands in any other character.

In order to take a case out of the operation of the statute of limitations, a mere acknowledgment of a debt being due is not sufficient: there must also be a promise absolute and unconditional to pay; or, if conditional, the condition must be shewn to have been fulfilled. In the present case the promise is conditional, and there has been no performance of the condition, viz. the giving up the original bill. Besides, there was no evidence to shew that the bill upon which the action is brought was that to which the defendant alluded in his letter: and there are many cases wherein it has been determined that the debt must be identified. In *Fearn v. Lewis*, in assumpsit by the drawer against the acceptor of a bill of exchange, the defendant pleaded the statute of limitations, and two letters written by him to the plaintiff's agent were given

(*f*) 1 Stark. N. P. C. 499.

in evidence to take the case out of the statute. In the first letter, the defendant said, that he should be much obliged to the plaintiff to withdraw his outlawry; that, as soon as the defendant's situation would allow, the plaintiff's claim, with others, should receive that attention, that, as an honourable man, the defendant considered them to deserve, and that it had been and was his intention to pay them; but that he must be allowed time to arrange his affairs; and, if he were proceeded against, every exertion of his would be rendered abortive. In the second letter, the defendant said that he was willing to do every thing to satisfy the plaintiff and all his creditors; but that, if he was imprisoned, they would not get any thing. It was held that these letters did not contain an absolute unqualified acknowledgment from which the Court could infer a promise to pay, but merely a conditional offer by the defendant to give up his income to his creditors, provided he were allowed time to arrange his affairs: and, the plaintiff, having offered no evidence of the outlawry, was nonsuited, on the ground that, without proof of the outlawry, there was no evidence to connect the acknowledgment in the letters with the plaintiff's claim; and it was held that such nonsuit was proper. Lord Chief Justice Tindal there said (g): "The question is whether these letters constitute a distinct and unqualified acknowledgment of an existing debt. Now, the first letter points to a debt on which the defendant had been proceeded against to outlawry, and, though this record might not of necessity shew whether the defendant had been outlawed or not, yet, unless the plaintiff proved that circumstance, his claim would not appear to be one to which the acknowledgment in the letter could apply. But neither of the letters import such a direct and unqualified acknowledgment of a debt as would authorize the Court in implying

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a promise to pay. They import no more than an offer on the part of the defendant to surrender his income, with a view to an arrangement with his creditors, provided he be allowed time to arrange his affairs." In *Kennett v. Milbank*, the defendant had signed the deed, and thereby acknowledged that a debt was due to the plaintiff; but the amount was not mentioned: and, the instrument being void as a deed, it was contended that it still afforded evidence of an acknowledgment: but Lord Chief Justice Tindal said (*h*): "The deed clearly contains no acknowledgment of the debt for which the plaintiff sues; it only applies to debts due to those creditors whose names are mentioned in the schedule, and the plaintiff's name nowhere appears in the schedule, neither does it appear that he ever came in as a creditor under the deed. *An acknowledgment must go to the amount of the debt.*" In the present case the identity of the debt is not made out, nor the amount ascertained, with any more certainty than in those cases. In *Tanner v. Smart* (*i*), on issue taken upon the plea of *actio non accredit infra sex annos* in an action of *assumpsit*, it was proved that the defendant within six years said, on being applied to for payment, "I cannot pay the debt at present, but I will pay it as soon as I can:" and it was held that this was not a sufficient acknowledgment to take the case out of the statute of limitations, without proof on the part of the plaintiff of the defendant's ability to pay. "Upon a general acknowledgment," said Lord Tenterden (*k*), "where nothing is said to prevent it, a general promise to pay may and ought to be implied; but, where the party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?" In *Whippy v. Hillary* (*l*),

(*h*) *Ante*, Vol. I, p. 105.

(*k*) 9 *Dow. & Ryl.* 555.

(*i*) 6 *Barn. & Cress.* 603; 9 *Dow. & Ryl.* 549.

(*l*) 3 *Barn. & Adolph.* 399.

it was held that the statute of limitations is not barred by a letter in which the defendant states "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information:" for, by the statute 9 Geo. 4, c. 14, s. 1, the acknowledgment in writing to bar the statute of limitations must be signed by the party to be charged *thereby*; and such letter does not charge the defendant. Mr. Justice James Parke there said: "The endeavour here is to raise a promise on the letter produced contrary to what the instrument itself implies. It is clear the defendant did not mean to render himself personally chargeable; he only refers to others by whom the debt is to be paid." That case shews, that, to make the acknowledgment available, it must appear that the party *intended* to render himself liable upon a new promise. Here, there could have been no such intention, except on the plaintiff's compliance with the proffered condition.

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Lord Chief Justice TINDAL.—I see no ground for disturbing the verdict upon either of the objections urged. The first objection is, that, though the plaintiff is now the holder of the bill, yet, it had once been out of his possession, and therefore he should have shewn that he had legally re-acquired the right to sue upon it as a holder for value. It appeared from the evidence that the plaintiff was the drawer of the bill, and that it had been made payable to him: he was therefore *prima facie* the holder. It was then attempted to be shewn that the plaintiff and another person had put the same bill in suit, as assignees, on the indorsement of one Cull, a bankrupt, against the defendant. No writ in that cause however was produced:

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but a mere declaration. Now, a declaration, like a bill in Chancery, is no more than the fiction of the pleader. The defendant ought to have shewn some better reason to induce the belief that the bill had got out of the hands of the plaintiff, or had not properly got back to his hands. For any thing that appears, that action (if brought) might have failed in consequence of its being brought by the wrong party. The defendant's proof did not go far enough.

The objection as to the statute of limitations depends entirely upon the construction of the letter of the 30th September, 1827: the only question is whether that letter imports an absolute or only a conditional acknowledgment of the debt. The construction that I put on it is, that it is unconditional. It contains a distinct admission that there is a balance due of 30*l.* 9*s.* 9*d.*; and that on this very bill, for no other bill was put forward at the trial than the one now in suit. The first part of the letter shews that it is in answer to a prior application by the plaintiff for payment of a debt, and that something is due to the plaintiff. It then proceeds—"Your better way will be to give up that bill which you hold, and draw another for 30*l.* 9*s.* 9*d.*, which will be the balance of the account; which shall be honored when due." The words "*which will be* the balance," certainly seem to denote a prospective time; but, in the ordinary familiar use of the words, they amount to this, that the sum mentioned *is* the balance due. The letter gives the plaintiff an opportunity to draw another bill if he please: but the defendant is merely recommending a particular course, not making his promise depend on its adoption by the plaintiff. The acknowledgment that 30*l.* 9*s.* 9*d.* are due is absolute and unqualified.

Mr. Justice PARK.—I am of the same opinion. There clearly was not sufficient evidence to shew that the plaintiff was not the holder of the bill. With respect to the other point, the argument turns on the assumption that

the letter contained a mere conditional promise, and that the condition has failed. I do not however think that any condition at all is to be inferred from the language used: and the promise clearly must be taken to refer to the bill upon which the action is brought, there being no evidence whatever of the existence of any other, or of there being any other account between the parties, of which the sum mentioned could be the balance. In every view of it, therefore, I think this case is perfectly distinguishable from those that have been cited.

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Mr. Justice Bosanquet.—I am also of opinion that no evidence was given at the trial to impeach the title of the plaintiff as holder of this bill. It appears that the plaintiff was the drawer, and therefore the original holder. *Prima facie* he was so at the time of bringing this action. In order to rebut his title, some evidence was given to shew that certain proceedings had been taken on a similar bill; that a declaration in that action had been prepared by a pleader, of which a draft was produced, and by which it is said to have appeared that the plaintiff was then suing on the bill in question jointly with another person in a character different from that in which he now comes. Those proceedings, however, did not appear to have been carried any further. That clearly was not enough to rebut the presumption of the plaintiff's title to sue as holder of the bill. In the case relied upon on this part of the case—*Machell v. Kinnear*—the circumstances were very different from those of the present; and the party suing on the bill was not, as here, the original holder. That case therefore does not apply.

As to the statute of limitations—the letter relied on to take the case out of the statute must be read by the Court as any ordinary person would read it; and, so reading it, I think it impossible to understand it in any other sense than as containing an absolute unqualified admission that there is a balance of 30*l.* 9*s.* 9*d.* due upon the bill. There

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is no condition whatever annexed to the acknowledgment: but merely a suggestion as to the better way of liquidating the debt. I agree, that, where the promise to pay is made subject to a condition, though there be an absolute acknowledgment that the debt is due, the law will not treat the promise as absolute. No evidence was given as to any other debt to which the promise here could apply: and the jury have expressly found that there was none other. I therefore think there is no pretence for disturbing the verdict.

Mr. Justice ALDERSON.—There was not evidence enough given to raise the first point. No sufficient doubt was thrown on the plaintiff's title to sue as holder of the bill, to call upon him to shew how he became the holder. If the defendant had gone on and shewn that a plea had been pleaded to the declaration of 1829, that there was an available defence in that action, and that it was discontinued—that would have sufficed to call on the plaintiff to account for his present possession of the bill.

Upon the other point, I entirely agree with the rest of the Court, that the letter produced was a sufficient promise to take the case out of the statute—the jury finding, as they did, that the bill which is the subject of this action is the same that is mentioned in the letter. If, indeed, the plaintiff had sued the defendant for not accepting the new bill, he must have shewn the performance of the condition, viz. the return of the original one. The acknowledgment of the balance is absolute, the promise to accept another bill is conditional, on the return of the former.

Rule discharged.

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BELCHER and Others, Assignees of MABERLY, a Bankrupt, v. PRITIE and Another.

THIS was an action of trover brought by the plaintiffs, assignees of Mr. Maberly, a bankrupt, to recover from the defendants, trustees under a settlement made on the marriage of Colonel Maberly, the son of the bankrupt, certain title deeds of a house and furniture that had been by a deed of assignment, bearing date the 1st July, 1831, conveyed by the bankrupt to the defendants, in trust, to sell the same and apply the proceeds in satisfaction pro tanto of a bond debt of 12,300*l.*, formerly due from the bankrupt to his son (on a bona fide consideration), which bond debt Colonel Maberly had, on his marriage, settled on his wife—on the ground that the assignment was voluntary, and made in contemplation of bankruptcy.

Thursday,
Jan. 23rd.

M., a trader carrying on a banking establishment of some magnitude and an extensive linen manufactory in Scotland, and a bazaar in London, had in the year 1825 mortgaged the whole of his property. In June, 1831, a sum of 75,000*l.* having been called in, and M. being unable to pay it, he agreed to sell to the devisee of the mortgagee his interest in

the linen manufactory for 104,000*l.*, receiving from him the difference in money. Certain of M.'s property being thus released from mortgage, his son, to whom he was indebted in a sum of 12,300*l.* for money advanced, and to whom he had given a bond, which the son on his marriage had assigned to trustees for the benefit of his wife, called upon his father and requested him to assign to his wife's trustees a certain house and furniture in part satisfaction of the bond debt. M. assented, and thereupon directed his solicitor to prepare the conveyance, which was executed on the 1st of July, 1831, but not enrolled, nor registered, or otherwise made public, for more than six months afterwards. The fact of the sale of his interest in the linen concern was also kept secret, unknown even to his own clerks; and the advertisement of the dissolution of the partnership therein between himself and his co-proprietor was at the request of M. deferred; he assigning as a reason for desiring it, first, that it might prejudice his interests in a borough for which he was member, and afterwards, that it might cause a run on his Scotch banks, which he was not prepared to meet; and when told, at the end of December, that the dissolution would be advertised in the next Gazette, M. stopped payment. The stoppage took place on the 2nd of January, 1832, and a commission of bankrupt was issued against him on the 26th. At the time of making the assignment to his son, the state of his affairs (as appeared from accounts made out after his failure) was this:—The bazaar produced a profit of about 2,000*l.* a year; but, in the banking concern, there was a deficiency varying between the months of January and July, 1831, from 66,000*l.* to 76,000*l.* The debts proved under the commission amounted to 113,000*l.*, the available assets to 68,000*l.* In an examination upon interrogatories, M. stated that he did not contemplate bankruptcy when he executed the assignment, nor did he execute it with intent to defeat or delay his creditors; and that he was moved to it solely by the request of his son. In an action brought by the assignees of M. to recover the title deeds of the property thus assigned, on the ground that the assignment was voluntary and made in contemplation of bankruptcy, it was left to the jury to say—first, whether the assignment was spontaneous on the part of M., and made with a view to prefer his son, to the prejudice of the rest of his creditors—secondly, whether M. was in such a situation at the time that he must have known, or had reason to suppose, that bankruptcy was inevitable. The jury having found for the defendants—affirming the validity of the transfer—The Court refused to grant a new trial.

In such a case it is no ground for granting a new trial for misdirection, that the Judge expresses a strong opinion upon the facts either way; the whole being left to the discretion of the jury, and the question one peculiarly for their consideration.

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The cause was tried before Lord Chief Justice Tindal, at the Sittings in London after the last Trinity Term. The facts were as follow:—The bond above mentioned was given by Mr. Maberly to his son in the year 1828, to secure a sum advanced by the latter to the former. Mr. Maberly, the bankrupt, had been engaged in a number of large speculations. A short time before the assignment in question, his concerns were reduced to three; his banking establishments in Scotland—the principal concern being at Edinburgh, with branch banks at Aberdeen, Montrose, Dundee, and Glasgow; the Horse Bazaar, in King Street, Portman Square, which yielded an annual profit of about 2,000*l.*; and a share in an extensive linen manufactory in Scotland, yielding a profit of about 8,000*l.* a-year. He was also, in the year 1831, engaged in the negotiation of a loan for the government of Terceira; which, however, was an affair so hopeless, that, though not absolutely at an end, no subscribers could be obtained. In the month of December, 1825, the bankrupt had mortgaged to Messrs. Leader & Langford the whole of his real property, with the exception of a place in Surrey, called Spring Park (which was already under mortgage to Leader for a sum of 30,000*l.*), together with his interest in the Scotch linen manufactory, the bazaar, two debts due to him amounting to 8,635*l.*, and also certain policies of insurance upon his life, to secure a large sum of money, about 75,000*l.*, which they had advanced to him. The assignment of this property was expressed to be made for the purpose of securing the re-investment of stock on or before the 12th of June, 1826. On the death of Mr. Leader, his executors applied to Mr. Maberly to redeem the mortgage; which the latter declared his inability to do, unless by selling to Mr. Leader's son his share in the linen concern. Accordingly, in May, 1831, it was agreed that Leader the younger should take Mr. Maberly's interest in that establishment, at the price of 104,000*l.*—the difference (about 28,000*l.*) being paid by him to Maberly. This transfer was so se-

cretly effected as to be unknown even to the clerks in the bankrupt's establishment: and it was agreed that the dissolution of the partnership between Richards (the other partner in the linen manufactory) and Maberly should not be advertised till the month of December following—the bankrupt assigning as a reason for making this request, that, if the fact were made known before the dissolution of the then parliament, which was expected to take place shortly, it might have the effect of impeding his re-election for the borough of Abingdon, for which place he was member, and where his connection with the linen concern was supposed to give him considerable influence, by reason of certain manufactures that are carried on at Abingdon. When December arrived, Mr. Maberly wished the advertisement to be further postponed; and he then assigned as a reason that he feared lest it might cause a run upon his Scotch banks, which he was unprepared to meet. And, when told that the dissolution would be announced in the next Gazette, he immediately stopped payment. In order to shew the motives of Mr. Maberly in making the assignment in question, and the degree of pressure had recourse to for the purpose of procuring it from him, the only evidence was the examination of Mr. Maberly himself (who was described as being a man of a very sanguine temperament), upon interrogatories; confirmed to a certain extent by the evidence of Mr. Masterman, and of Mr. Walford, his solicitor. On his examination Mr. Maberly stated, that, on the 13th of June, his son came to him (he being then confined to his bed by illness), and, telling him that he had learned from Mr. Masterman (who was one of Leader's executors) that he had sold his share in the linen concern to Leader the younger, and that, in consequence, his property had been relieved from the mortgages that were charged upon it; he (the son) requested that the house in the Regent's Park might be assigned to his wife's trustees, as a security for the bond debt, and begged that his father would give directions to his

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solicitor upon the subject; and that he (the bankrupt) promised that this should be done immediately, and authorized his son to call on Mr. Walford to arrange the matter, and afterwards wrote himself to Mr. Walford, desiring him "to convey over to the colonel's trustees the property in question in lieu of the bond." Mr. Maberly further deposed that he did not contemplate bankruptcy when he executed the said indenture of assignment; nor did he execute the same with an intention to defeat or delay any of his creditors in obtaining payment of debts owing by him to them: but that, on the contrary, he anticipated a large surplus on the winding up of his affairs. Mr. Walford stated that he went to Mr. Maberly on the 15th of June, when the latter told him, that, as the lease of the house in the Regent's Park was relieved from the charge created by the mortgage to Leader, which had been satisfied as above stated, he wished to make it over to his son's wife's trustees in discharge of the bond; that he told Mr. Maberly that the trustees could not take it in satisfaction of the bond; but that it might be assigned to them in trust to sell the same and apply the proceeds, as far as they would go, in discharge of the bond debt; and that a deed to that effect was accordingly, by the direction of Mr. Maberly, prepared and executed on the 1st of July. It further appeared that no notice of this assignment had been given at the office of the Commissioners of Woods and Forests; and that it was not docquettted under the land revenue acts till the 7th January, 1832, nor inrolled at the auditor's office till the 12th January, nor registered till the 24th. Mr. Masterman and Mr. Freshfield stated that Mr. Maberly's bankruptcy was unexpected.

Accounts were produced at the trial shewing the exact state of Mr. Maberly's balances at the several banking establishments on given days in the months of January, February, March, April, May, June, and July, 1831, the result of which was that these accounts exhibited a deficiency of assets to meet deposits, varying from 66,000*l.* to

76,000*l.* In order to shew that Mr. Maberly must have been aware of this state of things, it was proved that the accounts of the balances at the Scotch banks were transmitted to him daily in London.

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The commission issued against Mr. Maberly on the 26th January, 1831. The debts proved amounted to about 113,000*l.*, the available assets to 68,000*l.* At the time he stopped payment, the bankrupt had in the hands of his London bankers a balance of about 12,000*l.* in cash and 8,000*l.* in bills.

His Lordship left it to the jury to say—first, whether the assignment in question was spontaneous on the part of Mr. Maberly, and made with a view to prefer his son, to the prejudice of the rest of his creditors—secondly, whether Mr. Maberly was in such a situation at the time that he must have known, or had reason to suppose that bankruptcy was inevitable: commenting upon the facts at considerable length, and with a rather strong leaning in favour of the validity of the transfer; but at the same time telling the jury that it was for them to determine those questions upon the evidence laid before them, taking into consideration the answers given by Mr. Maberly himself to the interrogatories administered to him, which he told them established the legality and bona fides of the transaction, unless they could come to the conclusion that Mr. Maberly had been guilty of perjury in the answers he had given.

The jury returned a verdict for the defendants.

Mr. Serjeant *Wilde*, in Michaelmas Term, moved for a rule nisi that this verdict might be set aside and a new trial had, on the grounds of misdirection, and that the verdict was against evidence.—In order to avoid a transfer made under circumstances like the present, it has never been held that the bankruptcy of the party must have been inevitable —*Poland v. Glynn* (a). In that case Lord Chief Justice

(a) 2 Dow. & Ryl. 310; 12 J. B. Moore, 109, n.; 4 Bing. 22, n.

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Abbott said (*b*): "I told the jury, that, if at the time of a payment to one creditor the debtor had fair grounds for anticipating bankruptcy as a probable result, and made that payment voluntarily, such payment was a fraud upon the statute, and could not be supported; but that, if it was made in consequence of the threat or importunity of the creditor, it was a legal payment, and protected." And Mr. Justice Bayley: "I take the general rule of law upon the subject to be, that a voluntary payment to one creditor under circumstances which must reasonably lead the debtor to believe bankruptcy *probable* (not *inevitable*; for, I do not think it necessary the rule should go that length), is a fraud upon the creditors, within the meaning of the bankrupt laws, and that money so paid may be recovered by the assignees when a bankruptcy has taken place." The established rule is clear, that, if the debtor has reason to believe bankruptcy to be very probable at the time he voluntarily parts with his property, the transaction is void—*Cook v. Rogers* (*c*), *Gibbins v. Phillips* (*d*). In *Cook v. Rogers*, it appeared that the bankrupt was indebted to the defendant on a bill of exchange drawn by the defendant upon and accepted by the bankrupt's father; that, ten days before the bill became due, the defendant threatened to arrest the bankrupt and his father, if it were not paid; when the bankrupt paid the amount to the defendant. On the bankrupt being called as a witness, he stated that his object in paying the defendant was, to secure his (the bankrupt's) father, and at the same time to benefit the defendant; that he did not recollect that the defendant had used any threat; and that he did not contemplate bankruptcy at the time: but he committed an act of bankruptcy a few hours afterwards. Lord Chief Justice Tindal left it to the jury to say, whe-

(*b*) 2 Dowl. & Ryl. 314.

(*d*) 7 Barn. & Cress. 529; 2

(*c*) 5 Moore & Payne, 353; 7 Man. & Ryl. 238.
Bing. 438.

ther, under all these circumstances, the payment was made in contemplation of bankruptcy, and voluntarily, or in consequence of a threat from the defendant; and that it was for them to consider what was passing in the bankrupt's mind at the time of the payment, and the probable motives by which he was actuated: it was held that this direction was proper; and the jury having found that the payment was voluntary and made in contemplation of bankruptcy, the Court refused to disturb the verdict. Mr. Justice Alderson there said (*e*): "In every case of this description there are two points—the one, whether or not the payment has been made in contemplation of bankruptcy—the other, whether it were a voluntary payment. Both these are questions of fact which must be left to the jury upon the circumstances of each particular case, and the evidence adduced at the trial." And, after referring to the cases of *Crosby v. Crouch* (*f*), *Hartshorn v. Sladden* (*g*), and *Thornton v. Hargreaves* (*h*), he observes further—"It therefore seems to me that the motives of the bankrupt may be more or less material according to the situation in which he is placed at the time of the delivery of the goods or payment of the money to a creditor, as well as to the nature of the threat and the degree of the urgency of the demand. Threats and importunity on the part of the creditor are a strong circumstance to shew that the payment that ensues is not voluntary; but if, as in this case, the debtor is not placed in a better situation by yielding to the threats, it affords a strong inference the other way. The bankrupt could not be put in a worse situation by the defendant's threatening to arrest him if the bill were not paid when it should become due. It was therefore most material to ascertain if possible the motives by which the bankrupt was actuated when the payment was made. It is far

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(*e*) 5 Moore & Payne, 367, 8, 9.

(*g*) 2 Bos. & Pull. 582.

(*f*) 11 East, 256.

(*h*) 7 East, 544.

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too broad a proposition to say that the motives of the bankrupt are immaterial; for, in order to ascertain whether the payment was voluntary or not, it is material to consider the situation in which he was placed at the time." In the present case, though it is true that there was a long interval between the transfer and the bankruptcy, it is clear from the whole facts proved at the trial that the bankruptcy was postponed in order to protect this and other transactions—to deceive the creditors. Mr. Maberly must have contemplated bankruptcy as very probable to occur. And, as to the motive of the bankrupt, there can be no doubt; for, there was no evidence of the slightest urgency or threats used in order to induce the bankrupt to make the assignment.

Lord Chief Justice TINDAL.—This is a case of considerable importance, and the facts very complicated. I therefore think there should be a rule nisi on the ground that the verdict is against evidence: but, with respect to the other point, though I admit that I summed up the case to the jury with strong remarks in favour of the defendants, yet the whole facts were submitted to them, and they were at liberty to exercise their discretion, and I think there is not sufficient ground for saying that the jury were misdirected.

Mr. Justice GASELEE.—I am also of opinion that the rule should be granted only on the ground of the verdict being against evidence. It appears to me that the jury have come to a wrong conclusion. It is very true that the interval was long between the assignment and the bankruptcy; but I think it is evident that Mr. Maberly contemplated the probability, almost the certainty, of a run on the Scotch banks terminating in bankruptcy. I do not, however, think that the circumstance of the Judge having somewhat strongly stated to the jury his opinion upon the

facts, is enough to warrant us in saying that there has been a misdirection. The whole was certainly a question for the jury. In cases of this sort, some distinction must be made between the degree of urgency that a son would be likely to use with his father, and the ordinary pressure that a debtor may be supposed to experience from a hostile creditor: it is not at all probable that the son would use threats towards his father. The question on the subject of voluntary preference, was, whether Mr. Maberly consented to the transfer in consequence of the application made by his son.

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Mr. Justice Bosanquet.—I am of the same opinion. It is not because the summing up of a Judge has been couched in terms more or less strong than the Court think they would have used under similar circumstances, that they would be warranted in holding that there has been a misdirection.

Mr. Justice Alderson.—I am also of opinion that the substantial point was left to the jury; though perhaps I may conceive that I should not have put it quite so strongly: but that is no reason for saying that the jury have been misdirected, when the question is one peculiarly for their consideration. The verdict mainly depended upon the opinion formed by the jury as to the view that Mr. Maberly himself took of his situation at the time he was making the assignment in question.

The rule was accordingly granted only on the ground of the verdict being against the evidence.

Mr. Serjeant Coleridge and **Mr. Serjeant Talfourd**, in the course of this term, shewed cause.—They recapitulated and commented upon the facts detailed in the evidence at considerable length, and submitted, that, consi-

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dering the relative situations of the parties, the mere request of the son was equivalent to a pressure on the part of a stranger, the wife's trustees having at the time the power to enforce a compliance in the event of the father being found unwilling to yield to his son's solicitation; and that, considering the fluctuating nature of the extensive concerns in which Mr. Maberly's property was embarked, the length of time that intervened between the date of the assignment and the bankruptcy, and the statements made by the bankrupt himself upon his examination, the jury were fully warranted in coming to the conclusion that Mr. Maberly did not, at the time he made the assignment, contemplate either that bankruptcy was inevitable, or that it was an event that was at all probable. They cited *Lintott v. Bartlett* (i), *Harman v. Fisher* (k), *Round v. Hope Byde* (l), *Wheelwright v. Jackson* (m), *Fidgeon v. Sharpe* (n), and *Flock v. Jones* (o), as authorities to shew that the question whether a payment made by a debtor to a particular creditor if voluntary or not, and made in contemplation of bankruptcy or otherwise, is purely a question for the jury.

Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie*, in support of the rule, urged that the slight request stated by Mr. Maberly to have been made by his son, was not enough to warrant the jury in the conclusion that the assignment was other than voluntary and made in fraud of the rest of Mr. Maberly's creditors; and that the desperate state of his circumstances, as evidenced by the large deficiencies in each of his banking establishments; the compulsory sale of his interest in the linen manufactory, which was the most profitable concern he was engaged in, and the sole foundation upon which the banks rested; the secrecy observed on the sale of that concern to Mr. Leader; the studious

(i) 3 Wils. 47.

(k) Cowp. 117; Lofft, 472.

(l) 1 Cook's B. L. 94.

(m) 5 Taunt. 109.

(n) 5 Taunt. 539.

(o) 12 J. B. Moore, 86; 4 Bing.

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concealment of the fact from the knowledge of his creditors, avowedly in fear that if it were made known, it would occasion a run upon the banks, or, in other words, a call upon him to meet those engagements which he found himself utterly unable to meet: all tended to shew that he must have contemplated bankruptcy, must have known that he was insolvent at the time he executed the assignment in question.

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Lord Chief Justice TINDAL.—The question for the consideration of the Court upon the present occasion is, not whether we are *satisfied* with the verdict, but whether, upon the evidence adduced at the trial, assisted by the arguments of the learned counsel, we can see with sufficient clearness that the jury have come to a wrong conclusion in finding a verdict for the defendants; for, where the case involves mere matter of fact, and it has been properly submitted to that tribunal which the law has appointed to determine upon questions of fact, we are not at liberty capriciously to interfere to deprive the successful party of the right which he had acquired by the verdict of a jury, notwithstanding we may entertain a doubt as to the correctness of the conclusion at which they have arrived: we ought to be clearly satisfied that the verdict is against the weight of evidence before we put the parties to the expense and anxiety of a further investigation. Now, looking at the evidence given on the trial of this cause, and duly considering the various arguments that have been urged as well on the part of the defendants as on that of the plaintiffs, I cannot bring my mind to the conviction that such a degree of doubt exists in the present case as will justify the Court in making this rule absolute. With what intention a given act is performed is plainly a matter of fact, and is to be judged of by the jury; it is not a question of law for the decision of the Judge or of the Court: an inquiry involving the consideration of whether the act

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be fraudulent or not is peculiarly the province of the jury. There are two distinct grounds upon which the finding of the jury must depend; and, as we are unable to say upon which of these grounds the verdict passed, we must consider the facts applicable to both, in order to discover whether or not either of them will be sufficient to support the verdict. In the first place, the plaintiffs were bound to shew that the deed of assignment of the 1st July, 1831, the deed which it is sought by this action to set aside, was executed by Mr. Maberly at a time when he contemplated bankruptcy: and in the next place they were bound to establish by direct evidence that the assignment in question was executed by him spontaneously and of his own free will, and not in consequence of any solicitation or pressing request on the part of those who had a right to require it of him. With regard to the first point, I must say I can remember no case which has come before a jury encumbered with more difficulties in the way of proving that the party dispossessing himself of property by assigning it to a creditor acted at the time in contemplation of bankruptcy, than have occurred in the present case. In the first case of this kind that is to be found in the books, that of *Alderson v. Temple* (*p*), as also in *Harman v. Fisher* (*q*), which was determined soon after by the same learned Judge (Lord Mansfield), the transfer of the property was almost immediately followed by the act of bankruptcy. In the former of these cases it was held by that eminent Judge that an insolvent debtor cannot go out of the common course of trade to prefer a particular creditor; and in the latter, where A., a trader, in contemplation of *abesconding*, inclosed certain bills to T., a creditor, in discharge of his debt, saying he had the honour to shew him that preference which he conceived

(*p*) 4 Burr. 2235; 1 Sir W. Blac. 660.

(*q*) Cowp. 117; Loft, 472.

was due; and it was done without the privity of T., and followed by an act of bankruptcy before the notes could possibly be delivered—it was held, that, the essential motive being to give a preference, and the act itself being incomplete, it was clearly void, though in favour of a very meritorious creditor. No one could doubt but that in both these cases the party must have contemplated bankruptcy at the very moment he was parting with his property for the benefit of a favoured creditor. In the case now under consideration, the deed of assignment was executed on the 1st of July, 1831, and until the 2nd of January following Mr. Maberly continued to carry on the extensive concerns in which he was engaged, appearing to the world as a man whose circumstances were perfectly solvent, and up to that period experiencing none of those difficulties which then overwhelmed him. I cannot therefore but think that Lord Mansfield would have paused long before he would in a case so circumstanced have come to the same conclusion that he came to in the cases I have mentioned. I am not prepared to say that any precise limit can be drawn in cases of this description; but I think that, where the transaction that is sought to be impeached took place so long prior to the bankruptcy, we should pause and examine well the probable motives of the party before we hold the act fraudulent. It is extremely difficult to say that a trader who supports his credit in the commercial world for a period of six months, and, failing then, is found to possess available assets to the amount of 68,000*l.*, must of necessity have been in so desperate a situation that he himself must have lost all reasonable hope of a favourable termination: for, it must always be borne in mind that the question is, not what we, upon a view of the state of affairs as disclosed in the balance sheet, now think of the then condition of the bankrupt; but we must see what opinion he himself might reasonably form of the existing state of his circumstances at the time. I

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am not prepared to point out any precise limits in such a case: but I should be inclined to pause before I arrived at the conclusion that a transaction taking place so long before the bankruptcy was fraudulent. Looking at the multiplicity and at the magnitude of the concerns in which Mr. Maberly was engaged, who can say, that, taking the favourable view of his circumstances which a man may reasonably take, he was not warranted in forming an expectation of a successful termination to all or some of his speculations. The real question is, whether we are satisfied that in this case the jury, composed of men accustomed to business, and therefore the best judges of the matter, have so clearly drawn a wrong conclusion from the facts and circumstances laid before them, that we are bound to send the cause down for a further investigation. Besides, we have the oath of Mr. Maberly himself. He was examined before a commissioner, and he has deposed clearly and explicitly that he did not contemplate bankruptcy at the time this transaction took place, nor did he know that he was then in insolvent circumstances. Strong observations have been made upon the degree of weight that ought to be given to his testimony as to the state of his circumstances. Those observations, however, were more proper to be addressed, and were very forcibly addressed to the jury composed as it was of merchants of the city of London, and therefore fully competent to exercise a sound discretion. I cannot conceive that the formal and nicely calculated accounts that have been presented to us, shewing the exact state of the bankrupt's affairs on particular days in each month, were precisely the materials which he himself had, whereon to form a judgment as to his condition; and it is not likely that he brought forward his resources with the same degree of accuracy that the accounts exhibit. Then, was the transaction complained of a spontaneous act, or the result of pressure? The evidence shews that application had been

made by the son for the security in question: and he, as it seems to me, was the proper person to make the application. Upon the whole, I think, that, as the jury have not been able to satisfy themselves that Mr. Maberly has been guilty of perjury in his examination before the commissioner—for, to that conclusion they must have come had they found a verdict the other way—and, as I do not see that the circumstances of the case are such that that conclusion is necessarily wrong, I think the verdict ought not to be disturbed.

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Mr. Justice PARK.—I am of the same opinion. Both the questions his Lordship has stated were questions of fact for the consideration of the jury, and were properly submitted to them: and the only inquiry now is, whether we can see that they have so decidedly erred in the conclusion they have come to, that we must necessarily send the case down for a further investigation. There never was a case of this description in which the act that is called in question occurred at so great a distance of time as this from the period of bankruptcy. The length of time alone is, it seems to me, enough to prevent us from interfering. The decisions on this subject have certainly gone as far as they ought to go upon any mere question of fact. It has been assumed that Mr. Maberly was in embarrassed circumstances at the time of the making of this assignment; and, no doubt, if we look at the case with the after-knowledge that has been furnished to us, it does appear that he was at the time in a state of insolvency. But his embarrassed circumstances alone are not conclusive evidence that he contemplated bankruptcy. It is admitted that the assignment was made to a bona fide creditor—to secure to Colonel Maberly a debt of 12,300*l.*, which was owing to him by his father, and for which his father had given him his bond, which bond was settled by Colonel Maberly, at the time of his marriage, upon his intended

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wife. It appears, and indeed it is so sworn by Mr. Maberly himself, and confirmed by the testimony of Mr. Masterman, that the son went to Mr. Maberly, and stated that he had been informed by Mr. Masterman that he had parted with the linen concern in Scotland, and that certain of Mr. Maberly's property was then released from mortgage; and requested his father to convey to his wife's trustees the premises in question as a security for the debt due on the bond. What could be more natural than this? The son, being a married man, and anxious to place his provision for his family upon a safe foundation, expresses a wish to have a real security from his father. And what was more natural than for the father to accede to such a request? It is said that there was no importunity. There certainly was not that degree of importunity or pressure that a stranger might have used: but the degree must depend very much upon the relation in which the parties stand towards each other; a very slight importunity on the part of a son to his father, would be as strong as the severest pressure of a hostile creditor, and as likely to have weight. Lord Ellenborough, in *Crosby v. Crouch* (r), says: "In considering whether the act in question were in this sense properly voluntary, it is material to see from which party the proposition of making the deposit originated; whether from the bankrupt or from the defendant. It certainly proceeded wholly from the defendant. He is stated to have required the act to be done. It is, therefore, upon any fair interpretation of the words, not referable to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit; and it has not been suggested that such requisition and urgency were colourable." And so I say in this case. Mr. Smith appears to have been the only one

of the trustees who resided in this country. But the cestui que trust was, under the circumstances, the more likely as well as the more proper person to interfere in the business, than a mere trustee. And, if Mr. Maberly had intended fraud, or had intended voluntarily to prefer his son, the offer of security would naturally have come from him. But, instead of that, the son goes to the father. A period of fifteen days is suffered to intervene between the request of the son and the execution of the conveyance by the father; and the deed is not inrolled until six months afterwards. The transaction is altogether free from those circumstances of suspicion that usually attend cases of this description, where the payment, or deposit, or conveyance, is made on the eve of, and in evident contemplation of bankruptcy. It seems to me that there is nothing in this case to warrant us to come to the conclusion that the assignment was not made in consequence of the son's importunity, but fraudulently, and for the purpose of preferring him to the rest of the creditors. I do not wish to recede from any thing I am reported to have said in the case of *Cook v. Rogers*: every case of this sort must be determined upon its own peculiar circumstances. There is no imputation of perjury attempted to be cast upon the bankrupt; and I will, in conclusion, read what he swore on his examination before the commissioner:—"I did not contemplate bankruptcy when I executed the said indenture of assignment; nor did I execute the same with an intention to defeat or delay any of my creditors in obtaining payment of debts owing by me to them."

Mr. Justice Bosanquet.—I am also of opinion that sufficient grounds have not been laid before the Court to warrant it in disturbing the verdict. Two things must be established by the plaintiffs—first, that the transaction in question was voluntary—secondly, that Mr. Maberly contemplated bankruptcy at the time. These are questions

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of fact: and, though it is not necessary for the Court to say that they would have been dissatisfied had the jury come to a different conclusion, yet they must be fully satisfied that the present finding is altogether wrong before they will send the cause down for another investigation. I am by no means satisfied that the jury have come to a wrong conclusion. The first question is, whether this transaction was voluntary on the part of the bankrupt. To make out that it was so, it was contended that the evidence discloses no such urgency on the part of the son as will render the assignment other than voluntary. The circumstances of the case appear to be these:—Colonel Maberly was possessed (for valuable consideration) of a bond for 12,300*l.*, which had been given to him by his father before his marriage. On the happening of that event, Colonel Maberly assigned this bond to trustees in trust for his wife. On the 13th of June, Colonel Maberly (having learned that the property in question, which had before been under mortgage to a Mr. Leader, had recently been released from that charge in consequence of his father having disposed of the linen manufactory in Scotland) called upon the bankrupt and expressed a wish to have the house in the Regent's Park assigned to his wife's trustees in satisfaction of the bond. To this request the father assented. Upon his examination before the commissioner, Mr. Maberly swore that he did not make the assignment spontaneously; and that he did not contemplate bankruptcy when he executed it. It was for the jury to say, upon these facts, whether, when Colonel Maberly thus called upon his father, he was not understood as insisting upon a right—however delicate the manner in which the relative situations of the parties required him to urge the request. The trustees might have sued Mr. Maberly on the bond had he not acceded to his son's request. Upon the whole, although I am not prepared upon this part of the case to say, that, had the jury come to a

different conclusion, I should have been dissatisfied; yet I am equally far from saying that I am prepared to dissent from the conclusion to which they have come.—The more important part of the case, however, is the second point—viz. whether at the time of the assignment, Mr. Maberly contemplated bankruptcy—whether he had reasonable ground to suppose that his bankruptcy was, not inevitable, but very likely to occur. This also was peculiarly a question for the jury. The state of Mr. Maberly's affairs was minutely detailed at the trial. The jury had full opportunity to consider what that state was, and what, in their judgment as commercial men, must have been the inference that a man of business would have drawn from the state of his affairs, having the opportunity of examining into them which Mr. Maberly was proved to have had. Mr. Maberly's own estimate might fairly be, and it appears from the answers elicited from him upon his examination before the commissioner, was, very different from the result as represented by the evidence: and this also was a circumstance that the jury were at liberty to take into their consideration when judging of the motives by which he was actuated in making the assignment complained of. A great number of arguments have been urged on either side, all of which were properly urged before the jury, and very fit for their consideration. It is to be observed however, that, at the time of Mr. Maberly's stoppage, he had a balance of 12,000*l.* in cash and 8,000*l.* in bills at his bankers': and there is an entire absence of all those circumstances which are usually brought forward in cases of this description to shew the state of insolvency and embarrassment of the party at the particular time in question. The bankruptcy does not take place until more than six months afterwards.

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Mr. Justice ALDERSON.—I concur with the rest of the Court in thinking that this rule ought to be discharged. I shall however confine the few observations I have to

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make to the second point, because, if I were satisfied that Mr. Maberly did at the time of the transfer of this property contemplate bankruptcy, I should feel disposed to think that the other point should be further investigated—the only evidence upon the subject offered at the trial being that of Mr. Maberly himself. I am not, however, so clearly satisfied that the decision of the jury is wrong as to induce me to come to that conclusion. I do not think this case should depend on a minute investigation of the facts and accounts. Such an investigation was very proper to be made before a jury: but, in this stage of the case, where the question is, not what verdict ought to be returned, but whether the verdict that has been found ought to be set aside, it does appear to me that we ought not to proceed upon so minute an investigation of the facts. There are certainly in this case many singular circumstances, and they have been very ingeniously brought under our consideration. It appears that the situation of Mr. Maberly on the 15th June and 1st July was very remarkable, and one that certainly might have led many other men to consider their bankruptcy a probable occurrence. But this perhaps may be an argument less cogent than it appears, when the question to which it is to be applied is considered—not, what was the state of circumstances in which the bankrupt was actually placed at the time, but what was then passing in his mind on the subject. We have had laid before us a statement very carefully arranged, exhibiting at one view the state of affairs in all the complicated concerns in which Mr. Maberly was engaged. It is therefore scarcely fair for us to assume that we are dealing with the same state of facts that presented itself to the mind of the bankrupt; for, it is one thing to see a statement adroitly put together, and another to contemplate it, as the bankrupt would do, as the result of an examination of many various matters. It is by no means improbable that Mr. Maberly might have consider-

ed his affairs not hopeless when he looked at a number of large concerns necessarily surrounded with circumstances that would give rise to considerable doubt and uncertainty. It is highly probable that he did adopt a sanguine, perhaps an exaggerated view of the value of his property; for, he is said to be a man of a very sanguine temperament, and accustomed to make sudden and large profits upon speculations of a somewhat rash description. If the jury had come to the conclusion that the transfer was made in contemplation of bankruptcy, I might, perhaps, have been disposed to acquiesce in that determination: but I am also disposed to say that there are circumstances sufficient to warrant the opposite conclusion to which they have arrived. In the first place, there is the length of time that elapsed between the date of the assignment and that of the bankruptcy. Then, there are conflicting statements as to the value of the property. We are also to consider the deliberate and apparently honest manner in which the transfer is made: the omission to enrol the deed, which would probably have been guarded against had fraud been contemplated. There is, besides, the fact that the assets have realized the large sum of 68,000*l.*; and this by disposition under a commission. The assignment is made in satisfaction of a bona fide debt: and there is the further fact that no suspicion arose in the mind of any person as to Mr. Maberly's insolvency. Mr. Masterman, a man experienced in banking affairs, and Mr. Freshfield, an acute attorney; neither of these persons seem to have contemplated the probability of Mr. Maberly's bankruptcy. There is also the fact of no creditor being delayed, no pressure upon the bankrupt. And, lastly, there is the oath of Mr. Maberly upon the subject: and it is impossible for us to say that this verdict is wrong, unless we are prepared to say that Mr. Maberly is perjured. Under these circumstances, the question is, whether or not we shall interfere to set aside a verdict whereby the jury have acquitted Mr.

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Maberly of perjury, because there was evidence in the case which possibly might have warranted the jury in arriving at a different conclusion. The jury were the most proper persons to judge of the facts. They had the witnesses before them. They are familiar with mercantile affairs, and with the probable hopes and expectations of a commercial man. In fine, they are the constitutional judges in all cases of conflicting evidence: and I think we ought not to overturn their decision upon a question that is peculiarly within their province, unless it be made clearly to appear to us that they have erred.

Rule discharged.



*Thursday,
Jan. 23rd.*

A magistrate is not entitled to notice of action under the 24 Geo. 2, c. 44, s. 1, for a trespass committed by him, where from the circumstances the jury think he was not acting bona fide under an impression that what he did was within the scope of his duty as a magistrate.

JAMES v. SAUNDERS.

THIS was an action of trespass brought by the plaintiff, a carpenter, against the defendant, a magistrate, residing at Caermarthen, for an assault and false imprisonment. At the trial it appeared that a riot took place at Caermarthen on the occasion of the liberation of an individual who had been committed to prison by the magistrates for alleged violence at an election, but who was discharged by order of the Court of King's Bench; and that the defendant, who was at an inn near the scene of the riot, and heard a noise at a distance, and saw several persons passing towards the spot, rushed out, and, seizing the plaintiff by the collar, exclaimed—" You are one of the rascals," and detained him for a few minutes, till a constable who came up informed the defendant that the plaintiff was not one of the rioters. It further appeared that there was no disturbance near the spot where the plaintiff was, and that he was passing quietly along to his work. The conduct of the defendant was attributed by the plaintiff's witnesses to party spirit.

On the part of the defendant, it was objected that the action could not be maintained, inasmuch as no notice of action had been given prior to its commencement. Mr. Justice Bosanquet, before whom the cause was tried, told the jury that the defendant was not entitled to notice, the assault complained of not having been committed by him whilst acting in his magisterial capacity: but he told them, that, if they thought he was acting under an erroneous impression, they ought to give moderate damages. The jury returned a verdict for the plaintiff—damages, 10*l.*

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Mr. Serjeant *Wilde*, in Michaelmas Term, in pursuance of leave reserved to him for that purpose, obtained a rule nisi for a nonsuit, on the ground urged at the trial.—He submitted, that, in order to entitle a magistrate to the protection of the statute (*a*), it is enough to shew circumstances calculated to induce him to believe that he was warranted by his character of a magistrate in what he did.

Mr. Serjeant *Talfoord* now shewed cause, relying on the fact that there was no rioting or disturbance near the spot where the assault took place, nor any thing in the conduct or appearance of the plaintiff to justify the defendant in assuming that he was in the act of committing a breach of the peace; whence, he contended, a strong presumption arose that he was not bona fide acting in his character of a magistrate, but under the influence of party feelings.

Mr. Serjeant *Wilde*, in support of the rule.—The facts sufficiently shewed that the defendant intended to act in the performance of his duty, in suppressing the riot. A magistrate is entitled to notice of action when he acts as a magistrate, though what he does is not strictly within the scope of his office (*b*). The protection afforded by the

(*a*) 24 Geo. 2, c. 44, s. 1. (*b*) See *Bird v. Gunston*, 2 Chit. Rep. 459.

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statute can only be available where the magistrate has erred in supposing that the act he does is within the line of his duty.

Lord Chief Justice TINDAL.—I agree that the protection afforded by the statute can only be of use where the party has acted upon an erroneous supposition that the act he does is within the scope of his duty as a magistrate. The defendant in this case would clearly have been entitled to the notice of action required by the statute, had he been acting bona fide under an impression, though erroneous, that what he did was in the performance of his duty. But, from the circumstances, the jury thought, and I think they were warranted in so thinking, that the defendant was not acting bona fide in the exercise of his office. And the learned Judge who tried the cause not being dissatisfied with the verdict, I think there is no ground for disturbing it.

Mr. Justice PARK and **Mr. Justice BOSANQUET** concurred.

Mr. Justice ALDERSON.—I confess I am not quite satisfied with the verdict. I think it ought to have been left to the jury more distinctly to say whether or not the defendant conceived that he was bona fide acting in his character of magistrate in apprehending the plaintiff.

Rule discharged.

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KENDALL v. ALLEN.

Thursday,
Jan. 30th.

MR. Serjeant *Wilde* obtained a rule nisi to stay the proceedings in this action, on the ground that it was brought in breach of good faith. The affidavit upon which the motion was founded disclosed the following facts:—In March, 1827, the plaintiff's son, who had become bankrupt, was indebted to the defendant in a considerable sum for business done by the latter (as an attorney) for him. The defendant held in his hands a bond given by the plaintiff's son to the plaintiff, upon which he claimed a lien; and it was agreed between them, that, in consideration of the defendant's giving up this bond, the plaintiff would discharge the debt due from her son to the defendant, out of the dividends to be obtained thereon under the son's commission. The defendant accordingly petitioned the Lord Chancellor, on behalf of the plaintiff, to be allowed to prove for this bond; which was decreed accordingly; and a dividend of 65*l.* 11*s.* 9*d.* was received thereon by the defendant. The defendant's bill for costs incurred touching the proof, and also his bill for business done for the plaintiff's son, were delivered to the plaintiff, who procured a Judge's order for their taxation, when the former was taxed at 111*l.* 14*s.* 7*d.*, and the latter at 89*l.* 5*s.* 9*d.*, which sums were, together with a sum of 300*l.* that had previously been remitted to the plaintiff by the defendant, deducted from the sums received by the defendant on the plaintiff's account, and the balance paid to her, she giving a receipt for it as “being the balance of the dividends received on her account.”

The plaintiff obtained a Judge's order, with the usual undertaking, for the taxation of a bill of costs due from her son to the defendant:— Held, that it was not competent to her afterwards to bring an action against the defendant to recover back the money paid by her in pursuance of that order, in the absence of proof of fraud or misrepresentation by the defendant. The Court, therefore, stayed the proceedings.

Mr. Serjeant *Jones*, contra, produced affidavits suggesting, but not satisfactorily, that the plaintiff had been induced by the misrepresentations of the defendant to allow the 89*l.* 5*s.* 9*d.* to be retained by him on account of her

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son's debt. He submitted that she was, at all events, entitled to have the matter investigated before a jury.

Lord Chief Justice TINDAL.—The plaintiff seems to have voluntarily paid to the defendant the debt due to him from her son, and therefore it is not competent to her to 'sue the defendant to recover it back, unless it be clearly made out (which is far from being the case here) that the payment was made in ignorance of the facts, or in consequence of any fraud or misrepresentation by the defendant. Besides, the plaintiff, it appears, obtained a Judge's order for the taxation of her son's bill as well as her own, and, after the taxation, made no objection to the amount of both being deducted from the sum she was to receive from the defendant. If she had conceived that she was imposed upon, she should have applied to the Court at that time. I think under the circumstances the defendant ought not now to be harassed with an action.

Mr. Justice PARK.—The plaintiff's proceeding appears to me to be against good faith. It does not appear that any circumstance has since come to her knowledge that she was ignorant of at the time she obtained the order for the taxation of the two bills.

Mr. Justice GASELER concurred.

Mr. Justice ALDERSON.—The plaintiff having obtained a Judge's order for the taxation of both the defendant's bills, with the usual undertaking to pay the amount that should be found to be due, and having without question suffered the defendant to retain the amount, cannot now be permitted to proceed with the action, in breach of that order.

Rule absolute.

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CLARKE v. PEDLEY and Others.

*Saturday,
Jan. 25th.*

THIS was an action of trespass brought by the plaintiff, an inhabitant of the parish of St. George the Martyr, Southwark, against the defendant Pedley, one of the collectors of poor-rates for that parish, and two others, for seizing and impounding the plaintiff's goods.

The cause was tried before Mr. Justice James Parke, at the last Assizes at Croydon. The circumstances disclosed by the evidence were as follow:—A rate of one shilling and sixpence in the pound had been duly made upon the inhabitants of the parish of St. George for the relief of the poor, on the 12th October, 1832. The plaintiff being assessed at 22*l.* as the occupier of a house, he became liable by virtue of this rate to pay a sum of 1*l.* 13*s.* That sum having been repeatedly demanded without effect, a summons (a) was, on the 11th January, 1833, duly issued and served, calling upon him to shew cause “why a warrant should not be granted to distrain for the same, and for the costs thereof, *and of this summons one shilling.*” The plaintiff not attending in obedience to the summons, a distress warrant was obtained (b), directing a levy of *the amount of the rate, and the reasonable charges*

On a distress for arrears of a poor rate under the 50 Geo. 3, c. xlv, s. 3:— Held, that, although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it; and that one shilling is a reasonable sum in that behalf.

(a) A summons must precede a warrant of distress for a poor-rate. *Bex v. Benn*, 6 Term Rep. 198; 1 Bott. P. L. 269; 1 Nol. P. L. 254, 256.

(b) By the 3rd section of the 50 Geo. 3, c. xlv, intituled, “An act for the better assessing and collecting the poor and other rates in the parish of St. George the Martyr, in the borough of Southwark, in the county of Surrey, and regulating the poor thereof,” it is provided “that, in case any of the landlords

or occupiers, or any owner or owners, proprietor or proprietors, lessee or lessees of any land, ground, dwelling-house, shop, warehouse, coach-house, stable, cellar, vaults, building, tenements, or hereditaments within the said parish, theretofore made liable to pay any rate or assessment made, laid, and assessed by virtue or under the powers of this act, shall refuse or neglect to pay the money rated and assessed upon him, her, or them respectively, and all arrears due

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of the distress. The defendants, accordingly, on the 14th of March following, proceeded to execute the war-

thereon, or upon any former rate or rates, or the amount of any such composition or compositions, it shall be lawful to and for any one or more of his Majesty's justices of the peace acting for the Eastern half-hundred of Brixton and borough of Southwark, in the county of Surrey, and he and they is and are hereby authorized and required to summon, by writing under his or their hand or hands, all and every person and persons who shall have refused or neglected as aforesaid, upon oath (or affirmation, if made by a quaker) being made before him or them by any one of the churchwardens or overseers of the said parish, or by a collector of the said rate or rates for the time being, of his or their having attended upon or at the dwelling-house or last place of abode of all and every person and persons then intended to be summoned, and having demanded the rate or rates, composition or compositions of such person or persons, and of such person or persons having refused or neglected to pay the said rate or rates, composition or compositions, to appear before such justice or justices at a time and place to be mentioned in such summons, or before such other justice or justices acting in and for the said Eastern half-hundred of Brixton and borough of Southwark as shall be sitting upon the return of such summons or summonses; and it shall and may be lawful to and for the said churchwardens or overseers, collector or collectors, or

for any one or more of them, or of the constables or beadles of the said parish, to serve all and every such summons and summonses upon all and every person and persons so refusing or neglecting to pay as aforesaid, either by delivering the same to the person or persons thereby intended to be summoned, or leaving the same at his, her, or their last or usual place or places of abode, or at the premises for which the rates or composition mentioned in such summons shall remain due and owing; and, if any person or persons so summoned shall refuse or neglect to attend at the time and place mentioned in such summons, or if he, she, or they shall attend, and shall not shew good and sufficient cause to such justice or justices that they are not chargeable with such rate or rates, composition or compositions, then and in every such case all and every such person and persons who shall have been so summoned shall pay the reasonable costs and charges of such summons; and, in all cases where the said rate or rates, composition or compositions, or any of them, shall not be paid upon the return of such summons, it shall and may be lawful to and for such justice or justices who shall have issued such summons or summonses as aforesaid, or some other justice or justices of the peace acting for the said Eastern half-hundred of Brixton and borough of Southwark, and he and they is and are hereby authorized and required, upon oath being

rant; first demanding from the plaintiff 1*l.* 13*s.*, the amount of the rate, and *one shilling for the costs of*

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made before him or them of the due service of such summons or summonses by the party who shall have served the same, to grant a warrant or warrants under his or their hand or hands, seal or seals, authorizing or directing the said churchwardens or overseers, collector or collectors, or any constable or beadle of the said parish, or any one or more of them, *to collect and levy all and every such rate or rates, assessment or assessments, composition or compositions, and all arrears thereof, and the expense of the summons* (if the same shall not have been before paid) *and warrant*, by distress and sale of the goods and chattels of the party so neglecting or refusing, which shall be found either within the said parish or elsewhere; and if, within *five* days next after any such distress shall be made, the said rate or rates, assessment or assessments, composition or compositions, with all arrears due thereon, shall not be paid, *together with the reasonable charges of the summons* (if such summons shall not have been before paid for), *and warrant, and of making such distress, and keeping such goods and chattels*, the said churchwardens or overseers, collector or collectors, constable or constables, beadle or beadles, or any one or more of them, shall cause the said goods to be appraised by one or more appraiser or appraisers, and

to be sold, or such part or parts thereof as shall be sufficient to pay the said rate or rates, assessment or assessments, composition or compositions, together with all arrears due thereon, and *the reasonable charges aforesaid, and the charges of appraising and selling the same*, returning the overplus (if any) to the owner or owners of such goods and chattels respectively, upon demand thereof made by him, her, or them."

The 4th section enacts, "That every warrant of distress for non-payment of the said rates or assessments to be made in or for the said parish, or any or either of them, or of such composition or compositions, shall be in the words or to the effect following:—

"Surrey, } To the churchwardens,
to wit, } overseers, and collectors
of the poor or other
rates of the parish of
St. George the Martyr,
Southwark, in the coun-
ty of Surrey, and to all
constables, beadles, and
other peace officers for
the same parish.

"Whereas the undermentioned persons, now or late inhabitants, holders, landlords, tenants, occupiers, or enjoyers of lands, houses, shops, warehouses, coach-houses, stables, cellars, vaults, or other buildings, tenements, or hereditaments, or part of some building or

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the summons. The plaintiff tendered the £l. 13s., but refused to pay the shilling: whereupon his goods were

tenement within the said parish of St. George the Martyr, were and are truly rated and assessed, or liable to pay the rate and rates duly made for the purpose of an act made in the fiftieth year of the reign of king George the third, intituled, &c., or of the act or acts therein mentioned or referred to: and whereas the said persons have refused or neglected to pay the several sums of money at and against their names hereunder respectively set down for money due to them, for or towards the purposes in the said act mentioned, and the said several sum and sums are still remaining due, in arrear, and unpaid, as appeareth upon oath to me one of his Majesty's justices of the peace for the said county; and the said several persons having been summoned to appear before me or such other justice or justices as should be present at the vestry room in the church of the said parish on a day now past, to answer the premises, as also appeareth to me the said justice on oath; and they nor either of them having shewn any sufficient cause why such sum or sums of money should not be paid: these are therefore in his Majesty's name to will and require you or either of you forthwith to levy *the said several sums* due from the said persons, and hereunto joined to or set against their names respectively, by distress and sale of their respective goods and chattels (such

goods and chattels being kept before the same are sold until the seventh day after such distress shall be made, including the day on which it shall be made and the day of sale; and, if such seventh day shall happen to be on Sunday, then such sale shall be on the next or following day, rendering to them respectively the overplus (if any be), *the reasonable charges of such distress, sale, and keeping being first deducted*; and, if no sufficient distress can be had or taken, that then you certify the same to me, to the end such further proceedings may be had therein as to the law doth appertain: and I do hereby strictly charge and command all and singular the constables and other his Majesty's peace officers for the said county to be aiding and assisting in all things relating to the premises. Given under my hand and seal, &c."

(Signed by a justice of the peace.)

The distress in question was made by virtue of a general warrant in the form above given, directed against a great number of persons whose names were thereunder written; and opposite to them the sums due from them respectively were inserted in columns headed thus:—"Sums due for a poor-rate made the 12th day of October, 1832, at one shilling and sixpence in the pound:" and the sum set against the name of the plaintiff in this column was £l. 13s. At the bottom was an affidavit,

seized, and, in order to release them, he paid the sum demanded, together with three shillings for the costs of the levy (c).

The question intended to be raised was, as to the right of the overseers to demand a shilling for the costs of the summons. The learned Judge thought that, though the warrant of distress did not mention the costs of the summons, the defendant might levy the sum specified therein, together with the reasonable expenses of the summons: and he put it to the jury to say whether or not the sum demanded was a reasonable sum in that behalf. The jury found that it was. The plaintiff was thereupon nonsuited, with liberty to move to enter a verdict for nominal damages, if the Court should think the demand illegal.

Mr. Serjeant *Meredewether*, in the last term, obtained a rule nisi accordingly.—He submitted, that, the warrant being granted for the arrears of rate only, and not men-

signed by the collector, and made before the signing of the warrant, that the several sums set opposite the respective names were in arrear from the several persons against whose names they were set; and that he had duly served them and each of them with a summons to appear, &c., to shew cause why a warrant should not be granted to distrain for the same and costs.

There must (unless otherwise provided by the local act) be a particular and special warrant; and a distress cannot be made under a general warrant—*Tracey v. Talbot*, 2 Salk. 532; and the warrant is generally required to be signed by two justices.

(c) See the schedule to the statute 57 Geo. 3, c. 93: and see the 7 & 8 Geo. 4, c. 17, whereby all the rules, regulations, clauses, provisions, penalties, matters, and things in the above act contained, are extended, so far as the same are applicable and capable of being put in execution, to distresses for land-tax, assessed taxes, poor-rates, church-rates, tithes, highway rates, sewer rates, or any other rates, taxes, impositions, or assessments whatsoever, in all cases where the sum demanded or due for or in respect of such taxes, rates, tithes, assessments, or impositions, shall not exceed 20*l.*

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tioning the expense of the summons, the defendants were not justified by the warrant in distraining for the shilling.

Mr. Serjeant *Talfoourd* now appeared to shew cause : but the Court called upon—

Mr. Serjeant *Mereweather* to support his rule.—He read the third section of the local act, and contended that there was nothing therein to authorize the levy of any thing beyond the arrear of rate and the costs of the levy, not including those of the summons.

Lord Chief Justice TINDAL.—I think the defendants were entitled to demand the reasonable expenses of the summons. The only ground of objection is, that no mention is made in the warrant of the costs of the summons. But, had the sum specified in the warrant included such costs, it would not have accorded with the words of the act of parliament. The plaintiff is clearly out of Court.

The rest of the Court concurring—

Rule discharged (*d*).

(*d*) No action is sustainable for a poor rate—2 Burr. 1152; *Underhill v. Ellicombe*, M'Clel. & Younge, 456.

As to what are *treble damages*, given to the defendant by the

statute 43 Eliz. c. 3, s. 19, in a replevin on a distress for a poor rate, see *Newman v. Barnard*, ante, vol. 3, p. 748: and, as to the costs, see *Butterton v. Furber*, 4 J.B. Moore, 296, 1 Brod. & Bing. 517.

1834.

BARHAM v. LEE.

Friday,
Jan. 31st.

MR. Serjeant *Adams*, on a former day, obtained a rule nisi to set aside the proceedings in this action for irregularity. The affidavit upon which the motion was founded being by mistake dated January, 1833, instead of 1834—

Mr. Serjeant *Wilde*, after speaking to merits, took the objection, and submitted that the affidavit could not be used.

Mr. Serjeant *Adams*, contra, contended, that, having gone into the merits, the objection was waived.

PER CURIAM.—The point has been recently agitated in this Court, in the case of *Clothier v. Ess* (*a*), where it was held that appearing to oppose a rule does not waive an objection to the form of the affidavit upon which the rule was obtained. The reason was correctly given by one of the Court upon that occasion (*b*), thus:—"The Courts have said that they would not allow costs where the rule is discharged upon an ungracious objection: the plaintiff, therefore, very properly appears to shew that he has something like an answer upon the merits." The defendant therefore cannot be permitted to use the affidavit in question: but he may attempt to support his rule upon the affidavits filed on the other side.

It afterwards appearing that the irregularity complained of by the defendant had been waived, by his omission duly to avail himself of it, the rule was—

Discharged.

(*a*) *Ante*, Vol. 3, p. 216.

(*b*) *Mr. Justice Gaselee*.

Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained.

1834.

Monday
Jan. 27th.

In an action on a promissory note drawn in a foreign country, and due about twenty years since, the defendant pleaded the statute of limitations, and the plaintiff replied that he resided abroad until within six years of the commencement of the action. The Court afterwards (upon terms) allowed the defendant to add a plea setting up a provision of the law of the country where the note was made and the parties resided, similar in its effect to the statute of limitations.

HUBER v. STEINER.

THIS was an action brought upon certain promissory notes drawn by the defendant at a place called Mulhausen, in Upper Saxony, in the year 1813, in favour of the plaintiff. The action was commenced in May, 1833, the declaration delivered in October, and issue joined on the 14th of this month. The pleas were, the general issue, and the statute of limitations; to which latter there was a replication that the plaintiff was abroad until within six years of the commencement of the action.

Mr. Serjeant *Bompas*, on a former day, obtained a rule calling on the plaintiff to shew cause why the defendant should not have leave to add a plea, to the effect that, in the country in which both plaintiff and defendant were domiciled at the time of the making of the notes, and for more than five years after they became due, there existed a law (the place being then under the dominion of the French, and governed by the French laws) similar in its provisions to our statute of limitations—the limit being five years.

Mr. Serjeant *Taddy* now shewed cause.—If the debt accrued and the statute expired whilst both parties were subject to the foreign law, the alleged limitation would operate as a bar to the action all over the world. The plaintiff is willing to consent to the matter proposed to be pleaded being given in evidence under the general issue: for, as the record at present stands, the burden of proof of the foreign law will lie on the defendant; whereas, if it be put upon the record, the plaintiff will probably be compelled to reply something which will throw upon him the proof to be drawn from a foreign country. This is an inconvenience that the plaintiff ought not to be visited

with to favour the defendant, who ought to have shaped his defence properly in the first instance.

[It appeared that application had previously been made to Mr. Justice Gaselee, at Chambers; and that that learned Judge had refused to grant leave unless upon the terms of the defendant bringing the money into Court.]

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v.
STEINER.

Lord Chief Justice TINDAL.—It is so manifestly reasonable that parties should not be encouraged to come here and avail themselves of a law different from that which prevails in their own country, and thereby seek to obtain a different measure of justice after having for so many years slept upon their rights, that I think we ought to give the defendant the means of setting up the proposed defence. At the same time, justice requires that certain terms should be imposed on him. I think the rule should be granted, on payment of all the costs incident to the motion; the defendant admitting his handwriting to the notes, and consenting that there shall be judgment of the term in the event of a verdict passing for the plaintiff.

The rest of the Court concurring, and the parties consenting—

Rule absolute accordingly.

END OF HILARY TERM.

1834.

MEMORANDUM.

THE JUDGES who sat in the Court of Common Pleas during the foregoing term (with the exception of two days, when Mr. Justice Gaselee sat in lieu of Mr. Justice Bosanquet) were—

Lord Chief Justice TINDAL,
Mr. Justice PARK,
Mr. Justice BOSANQUET,
and
Mr. Justice ALDERSON.

In the Common Pleas.

EASTER TERM, 4 WILL. IV.

**Ex parte G. THOMAS, Wife of EVAN THOMAS,
a Lunatic.**

1834.

*Tuesday,
April 15th.*

MMR. Serjeant *Bompas*, on the part of Mrs. G. Thomas, moved that she might be at liberty to make, without the concurrence of her husband, a disposition by deed of certain messuages, lands, tenements, and hereditaments in the counties of Anglesea and Carnarvon, to which she was entitled as tenant in tail in possession, and tenant in fee simple in possession (*a*).

Motion under the 3 & 4 Will. 4, c. 74, s. 91, to dispense with the concurrence of the husband to a disposition by the wife of lands, &c., to which the latter is entitled in her own right.

(*a*) This was the first application made to the Court under the statute 3 & 4 Will. 4, c. 74, s. 91, which enacts, "That, if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause

whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and *upon such evidence as to the said Court shall seem meet*, to dispense with the concurrence of the husband in any case in which his concurrence is required by that act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and, when

1834.

Ex parte
THOMAS.

The motion was founded on the affidavit of the wife, sworn before a commissioner duly qualified to take affidavits, that a messuage or dwelling-house in the town of Carnarvon was devised to her in fee by one William Roberts, and that she was also entitled to a certain messuage or dwelling-house at Bangor, as tenant in tail in possession; that she and her husband Evan Thomas had lived separate and apart from each other for twenty-four years last past; that, some time since, her said husband became deranged, and that a commission de lunatico inquirendo was in November, 1833, issued to certain commissioners, whereupon the said Evan Thomas was found to be, and to have been since September, 1825, a person of unsound mind, so that he was not sufficient for the government of himself or his messuages, lands, tenements, goods, and chattels.

Rule absolute in the first instance (b).

done, executed, or made by her, shall (but without prejudice to the rights of the husband as then existing independently of that act) be as good and valid as they would have been if the husband had concurred: Provided always that this clause shall not extend to the case of a married woman where under that act the Lord High Chancellor, lord keeper, or lords commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband."

(b) *Ex parte Shuttleworth.*—Thursday, May 1. Mr. Serjeant Andrews moved that the concurrence of the husband of the applicant might be dispensed with, on an affidavit stating that she was married to him in the year 1815; that he left her in 1820; that she had never heard of or received any information respecting him since, and that his present residence was altogether unknown to her; that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage; and that, if the application were not granted, she would be liable to incur a forfeiture.

Rule absolute.

1834.

BROWN v. LORD GRANVILLE.

Tuesday,
April 15th.

THIS was an action against the defendant to recover the amount of certain rates assessed upon him under the Hanley and Shelton watching and lighting acts, 6 Geo. 4, c. lxxiii, and 9 Geo. 4, c. xxviii. The question intended to be raised was, whether or not the defendant was liable under the acts, as the owner or occupier of certain engine-houses or sheds in the township or vill of Shelton, erected for the protection of engines used for the working of a coal-mine belonging to the defendant, to be rated in respect of such engine-houses. It had originally been intended that the facts should be stated in a special case for the opinion of the Court of King's Bench: but, subsequently, in order to avoid the delay that must have attended the adoption of that course, it was agreed between the attorneys for the respective parties that the question should be raised by a demurrer to be argued before this Court. The agreement was as follows:—

"A. B. and C. D., attorneys for the plaintiff and defendant in this cause, hereby agree, that, whatever be the decision of the Court on the argument of the demurrer, each party shall pay his own costs and charges in and about the cause, *and that such decision shall bind the parties*, not only with regard to the sum of money claimed to be due by and sought to be recovered in this cause, but also with regard to all other monies due and owing from the defendant to the Hanley and Shelton police commissioners under the Hanley and Shelton watching and lighting acts."

The plaintiff and defendant, by their respective attorneys, agreed that a question at issue between them should be raised on demurrer, in order to a more speedy adjustment of it; and it was further agreed, that, whatever the decision of the Court on the argument of the demurrer might be, "each party should pay his own costs and charges in and about the cause, and that such decision should bind the parties." Judgment having been given for the plaintiff on the demurrer:—Held, that it was not competent to the defendant to sue out a writ of error thereon.

(a) *Ante*, Vol. 3, p. 453.

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BROWN
v.
Lord
GRANVILLE.

last term, on the motion of Mr. Serjeant *Coleridge*, obtained a rule nisi for liberty to enter the judgment on record. In the same term, Mr. Serjeant *Ludlow*, on the part of the plaintiff, obtained a rule nisi that execution might issue upon the judgment on the demurrer, notwithstanding the writ of error, on the ground that the defendant had precluded himself by the above-mentioned agreement from suing out a writ of error.

Mr. Serjeant *Wilde* now appeared to shew cause against the first-mentioned rule, and in support of the last.—He submitted that the intention of the parties, as expressed on the face of the agreement, was, that there should be but one discussion of the matter, and that no ulterior proceedings should be taken by either party to call in question the decision of the Court upon the demurrer; and therefore that the plaintiff was entitled to execution for the amount of the rates due.

Mr. Serjeant *Coleridge*, contra.—The defendant's common law right to take the benefit of the judgment of a Court of error, in the event of his being dissatisfied with that of the Court below, is not taken away by any thing contained in the agreement. This is not like a special case, where the judgment of the Court is made final and conclusive by the consent of the parties.

Lord Chief Justice TINDAL.—The only question in this case arises on the construction that is to be put upon the agreement entered into between the respective attorneys for the plaintiff and defendant. They may honestly and conscientiously differ as to what was their intention at the time of making it; and each party has undoubtedly a right to endeavour to support his own construction of it. It appears that it was originally intended that the facts should be stated in a special case, and set down for argument in

the Court of King's Bench. If that course had been pursued, the judgment of that Court upon the question would have been conclusive, and neither party could have taken any further proceeding in the cause. The attorneys afterwards thinking that the more speedy course would be to raise the question by demurrer in this Court, the declaration was framed with that view, and the attorneys agreed, that, whatever the decision of this Court should be on the argument of the demurrer, each party should pay his own costs and charges in and about the cause. Now, if the agreement had stopped there, I should have thought that it amounted to an assent on the part of the respective attorneys that the decision of this Court should be final; for, if the judgment could be suspended by a writ of error, no costs could have been incurred on the demurrer. It therefore appears to me, that, the parties having agreed to be bound by the judgment of this Court, in the supposition that they should thereby avoid the inconvenience of delay, it is now too late for either of them to say non haec in foedera veni. By entering into the agreement they virtually precluded themselves from the right of carrying the cause to a higher tribunal.

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—
BROWN
v.
Lord
GRANVILLE.

Mr. Justice PARK.—The parties came before me at Chambers; and I then put the same construction upon the agreement that my Lord Chief Justice has now done. Though this application may not be made, strictly speaking, in breach of good faith, still it seems to me to be an attempt to avoid an agreement. By the common law, every suitor has an undoubted right to sue out a writ of error: but, in holding that the defendant is not entitled so to do in this particular case, we do not deprive him of any right the law has given him; he has, by the terms of his agreement, bound himself to consider the judgment of this Court final.

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Brown
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Lord
Granville.

Mr. Justice GASELEE.—I am of the same opinion. The parties have by their attorneys consented that the decision of this Court on the demurrer should be conclusive. In order to expedite the cause, they agreed to raise the question on demurrer in this Court, instead of stating a special case for the opinion of the Court of King's Bench—virtually consenting that the demurrer should stand upon the same footing as the special case would have done. They are therefore barred by their agreement from calling in question the judgment pronounced by this Court.

Mr. Justice ALDERSON.—It appears that the object of the parties in stating the facts on the declaration, and raising the point by a demurrer, was, to avoid the expense of a trial and the delay that it was supposed must have arisen if they had pursued the course they at first intended, of setting down a special case for argument in the Court of King's Bench. To attain this object, it was agreed between the respective attorneys that the decision of this Court on the demurrer should be conclusive. The case therefore is not like the ordinary one of a judgment on demurrer: but is in effect a judgment upon a special case.

The rule obtained for the plaintiff, to sue out execution notwithstanding the allowance of the writ of error, must therefore be made absolute, and the rule obtained by the defendant, to enter up the judgment on record, discharged.

Rules absolute and discharged accordingly.

1834.

CURTIS v. CURTIS.

Thursday,
April 17th.

THIS was an action on the case for slander. The declaration contained seven counts. The first two, after setting out a scandalous letter reflecting upon the character of the defendant, charged the defendant with having slandered the plaintiff by imputing to him that he was the writer of it, and saying of and to the plaintiff, and of and concerning the letter, in the presence and hearing of divers persons, "I now tell you that this letter is your writing; and I can prove it on the oath of two persons. I can transport you. Denial will be of no avail: I can produce proof indisputable"—innuendo, that the defendant thereby meant to insinuate, and to have it to be understood and believed, that the plaintiff had committed an offence for which he was liable to transportation. The last five counts, without any colloquium, charged the defendant with having said to and of and concerning the plaintiff, in the presence of divers persons, "You have committed an offence for which I can transport you."

At the trial before Lord Chief Justice Tindal, at the Sittings at Guildhall after the last term, a general verdict was found for the plaintiff—damages, 40s.

Mr. Serjeant *Spankie* now moved that the judgment might be arrested.—The words charged to have been spoken by the defendant, merely having reference to the supposed authorship of a vulgar and scurrilous letter, the writing of which would not subject a party to the punishment of transportation, are not actionable. [Mr. Justice *Alderson*.—The letter was one for which the writer might have been indicted: imputing to the plaintiff the authorship of that letter, was therefore imputing to him the commission of an indictable though not a transportable offence. Mr. Justice *Gaselee*.—The innuendo may be rejected:

The words
"You have com-
mitted an act for
which I can
transport you;"
—Held, action-
able, without
colloquium or
innuendo.

1834.

CURTIS
v.
CURTIS.

the words are actionable without it. Lord Chief Justice *Tindal*.—The jury found that the defendant meant to impute to the plaintiff that he had been guilty of a transportable offence; though he was wrong in his law.] The words do not even charge an indictable offence: they merely charge the plaintiff with the writing, not the publication of the libellous letter.—The last five counts contain no colloquium and no reference to the letter: the words charged therein are therefore clearly not actionable: and the verdict is general. The alleged slander imputes no crime: it amounts to a mere assertion that the plaintiff is liable to the punishment of transportation. [Mr. Justice *Alderson*.—If a party be liable to transportation, he must have been guilty of a crime. In *Tomlinson v. Brittlebank* (*a*), the words “He robbed John White,” were held actionable, as imputing an offence punishable by law: and in *Slowman v. Dutton* (*b*), the words “He is a thief. You have robbed me of my bricks”—were also held actionable, without any introductory averment or innuendo to explain them.] The imputation conveyed by the words spoken only arises by inference: the word transportation does not necessarily signify a punishment.

The Lord Chief Justice *TINDAL*.—The question here only arises on the second set of counts, which contain no colloquium or prefatory averment to connect the words spoken with the occasion of the speaking. We must interpret words in the ordinary sense in which they would be interpreted by persons of common understanding. When it is said of one, that he has committed an act for which he could be transported, it must clearly be intended that he has been guilty of a crime that is punishable by transportation. And we are not without precedent for so

(*a*) 4 Barn. & Adolph. 630, 1 Nev. & Man. 455.

(*b*) *Ante*, p. 174.

holding: for, in *Donne's* case (c), where the words were "If you had had your deserts, you had been hanged before now," Coke moved "that the action did not lie, for that he did not shew any cause why he should be hanged." Curia, contra—"for, it shall be intended he had committed an offence for which the penalty of death was due to him." And Lord Chief Justice Wray said: "It hath been adjudged, that, where one writ the name of another upon a wall, and writ also—that 'If this man had his deserts, he should have been hanged on these gallows'—and drew a pair of gallows on the wall, that an action did lie for this."

1834.
CURTIS
v.
CURTIS.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—It has been held that imputing to a man that he is a thief, is actionable. So, here, when the plaintiff is said to have committed an act for which he may be transported, it must be taken to mean that he has been guilty of some crime that is by law punishable by transportation: no colloquium is necessary.

Mr. Justice ALDERSON.—Imputing to a man that he is liable to transportation, is clearly libellous.

Rule refused.

(c) Cro. Eliz. 62.

1834.

*Saturday,
April 19th.*

A memorandum of a contract for the sale and purchase of goods, to satisfy the statute of frauds, is good though no mention be made of price, provided none be stipulated for; and, where the contract is for the sale of goods to be manufactured, and alterations or additions are made in the progress of the work, such alterations or additions need not be made the subject of a distinct contract in writing.

In all cases of executors contracts for the purchase and sale of goods, where the parties are silent as to price, the law will supply the want of an agreement as to price, by inferring that the parties intended to sell and to buy at a reasonable price.

HOADLY v. SIR ARCHIBALD MACLAINE, Knight.

THIS was an action of assumpsit brought by the plaintiff, a coach-maker, to recover damages from the defendant for the non-acceptance of a carriage built by the plaintiff to the defendant's order.

The cause was tried before Lord Chief Justice Tindal at the Sittings at Westminster after last Michaelmas Term. The plaintiff having been applied to by the defendant to build a carriage for him, sent in an estimate amounting to three hundred guineas. Shortly afterwards the defendant expressed a wish to have a carriage of a different description from that originally agreed on, and accordingly wrote to the defendant on the 2nd July, 1831, as follows:—

“ Sir Archibald Maclaine orders S. Hoadly, of Oxford Street, to build him a new fashionable and handsome landauet, of the best materials and workmanship, with the following appointments and style. [Here followed a minute description of the intended vehicle]. The whole to be finished and ready for Sir Archibald Maclaine's use on the 1st March, 1833.

(Signed) A. Maclaine.”

On the 13th April, 1833, the defendant, who had in the interim seen the carriage in a finished state, again wrote to the defendant as follows:—

“ Sir,—I have several times called at your house, but you were either out of town or not to be seen. It is now nearly three weeks since I requested you to send me the bill for the new carriage, mentioning in the bill all the items belonging to it both for town and country. If you will call for me at eleven or ten on Monday with your account, I shall have the carriage out directly, as my harness and every thing has been finished for some time back.

(Signed) A. Maclaine.”

The carriage was accordingly sent to the defendant; but the price demanded being 486*l.*, the defendant refused to accept it. Several witnesses were called on the part of the plaintiff to prove that by reason of the various alterations made in the course of the building, and the expensive ornaments attached to it, the carriage was fairly worth the sum charged for it.

On the part of the defendant it was objected that the note of the 2nd July, 1831, was not a sufficient memorandum of the bargain to satisfy the 17th section of the 29 Car. 2, c. 3, and the 7th section of the 9 Geo. 4, c. 14—no mention being made therein of the *price* of the carriage. It was also objected that there was no memorandum of the whole contract, the original bargain being varied by the subsequent alterations.

The learned Judge reserved these two points for the consideration of the Court; and the jury returned a verdict for the plaintiff—damages, 200*l.*

Mr. Serjeant *Jones*, in Hilary Term, obtained a rule nisi to set aside this verdict, and enter a nonsuit.—1. There was no sufficient note or memorandum of the bargain to satisfy the statute: it ought to have shewn the price agreed on, or, if none were agreed on, it ought to have stated the bargain to have been for a reasonable price. The object of the statute was, to guard the purchaser from having imposed on him a bargain different from that stipulated for: and the price is one of the most material features of the transaction. [Lord Chief Justice *Tindal*.—Your argument carries the objection further than the case of *Elmore v. Kingscote* (*a*).]—2. It appeared by the plaintiff's evidence, that, after the agreement was entered into, various alterations and additions had been made to render the carriage more costly. If so, then there clearly was no

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memorandum of the bargain. To hold this memorandum, under the circumstances, sufficient, would be letting in all the mischief the act of parliament was intended to prevent. [Lord Chief Justice *Tindal*.—The adoption of the doctrine contended for would lead to extreme difficulty: any slight alteration—an alteration in the colour, for instance—would vacate the contract!].—3. Then, the contract upon which the plaintiff has recovered was not that declared on. The contract declared on was for the carriage mentioned in the memorandum: whereas the carriage in respect of which the plaintiff has recovered was proved by his own witnesses to have been a carriage of a very different description.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge* now shewed cause.—All that the statute requires is, that there should be a note or memorandum in writing of the bargain; and it is not necessary that the whole should appear upon the same document. In *Kenworthy v. Schofield* (b), Mr. Justice Bayley says: “By the word ‘bargain,’ the legislature intended to express the terms upon which the parties contract; and *Saunderston v. Jackson* (c) has decided, that, in order to satisfy the statute, there must be the signature of the parties or their agent either to some written document which itself contains the terms of the contract, or is connected with some other document containing them.” In the present case, coupling the original order given by the defendant with his note of the 13th April, 1833, written after the carriage was finished, and had been seen by the defendant, and desiring the plaintiff to send in his bill, there is clearly a sufficient memorandum in writing of the bargain to satisfy the statute: it discloses all that was actually agreed on between the parties. If

(b) 4 Dow. & Ryl. 556, 2 Barn. & Cress. 947.

(c) 2 Bos. & Pull. 238.

there be at the time any stipulation as to price, or as to the period of delivery, undoubtedly it is necessary that such stipulation should be found in the memorandum. Here, however, no price was agreed on; and therefore the law will infer that the carriage was to be paid for according to its reasonable value. The statute must be so construed as not to impede the convenient and ordinary course of business. In *Elmore v. Kingscote*, there was a distinct agreement as to price, as appeared by the parol evidence, and the memorandum put in was defective in that particular. In *Newbury v. Armstrong* (*d*), where a question arose upon the construction of the 4th section of the statute of frauds, Lord Chief Justice Tindal says (*e*): "The statute of frauds requires that an agreement to answer for the default of another shall be in writing; and the word agreement has been held to include a consideration, for without one there is no valid agreement. The question here is, whether a consideration appears on this agreement, or is to be collected from it by fair and necessary implication. We ought not to be too strict in the construction of these instruments; for, if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." And Mr. Justice Burrough said: "Whatever is necessarily implied may be taken to be in the instrument." Here, as the contract is silent as to price, and it does not appear that any price was agreed on between the parties, the law will supply the want of an agreement as to price, by inferring that the parties must have intended to sell and to buy at a reasonable price. The defendant's letter of the 13th April, 1833, shews that no specific price had been agreed on, and that the defendant adopted all that had been done by the plaintiff.—It is said that the memorandum is defeated by the subsequent alterations. If con-

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(*d*) 6 Bing. 201, 3 Moore & Payne, 509.

(*e*) 6 Bing. 202, 3.

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tracts entered into by builders and others be held to be avoided in consequence of every alteration or deviation from the specifications, unless each alteration be made the subject of a new memorandum, it will be impossible to carry on business at all. Some slight departure from the original plan is in almost all cases indispensable.

Mr. Serjeant Atcherley, in support of the rule.—By the 7th section of the 9 Geo. 4, c. 14 (*f*), *executory contracts* are put upon the same footing on which contracts *executed* before stood under the 17th section of the 29 Car. 2, c. 3. Until the passing of the late statute, the difficulty that occurs in this case could never have arisen: the decisions therefore upon the 4th section of the statute of frauds are totally irrelevant. The intent of the legislature in passing the statute of frauds was, to prevent the misrepresentation and injustice that frequently arose from the admission of oral proof of contracts. The statute therefore required that there should be a note in writing

(*f*) That section, after reciting, that, by the 29 Car. 2, c. 3, it is enacted, "that no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized;" and that it had been held "that the said recited enactment did not extend to certain execu-

tory contracts for the sale of goods, which nevertheless were within the mischief thereby intended to be remedied;" and that it was "expedient to extend the said enactment to such executory contracts"—provides "that the said enactment shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

of the bargain; that is, of every material stipulation entered into between the parties: and price is of the very essence of the contract. In *Elmore v. Kingscote*, it was expressly determined that the note of the bargain must state the price of the goods, or it will not satisfy the words of the statute. "There must," says Lord Chief Justice Abbott, "be a note in writing of the *bargain*; that is, of the *whole* bargain; and the price is a very material part of the bargain. This letter makes no mention of the price, and therefore it is not a note of the bargain. If we were to allow the plaintiff in such cases to prove the price agreed upon by parol evidence, we should be letting in much of that very mischief which it was the object of the statute to shut out." The memorandum ought to state whether there be a price stipulated or not. It does not by this memorandum appear that the price was *not* stipulated; and therefore the case is open to all the mischief the statute of frauds was framed to prevent.—The memorandum, even if sufficient per se to satisfy the statute, was not applicable to the contract in respect of the alleged breach of which the plaintiff seeks to recover. The action is brought, not for the non-acceptance of the carriage originally ordered, but for the non-acceptance of one of a totally different description. There should have been a note in writing to embrace the alterations and additions; otherwise there is no note of the *whole* bargain. And the plaintiff should have declared on the new contract.

Lord Chief Justice TINDAL.—This is an action brought by the plaintiff, a coach-maker, against the defendant, for not accepting a carriage built pursuant to order. The question raised depends upon the construction to be put upon the 7th section of the statute 9 Geo. 4, c. 14, which extends the provisions contained in the 17th section of the statute of frauds, 29 Car. 2, c. 3, to "all contracts for the sale of goods of the value of 10*l.* sterling and upwards,

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notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." In effect, it extends to executory contracts the provision that had before been confined to contracts that had been executed. As therefore the effect of the late statute was simply to enlarge the powers given by the former, both must receive the same construction. It may be permitted to me to notice the accuracy with which the 9 Geo. 4, c. 14, is in this particular framed, shewing that the distinction between executory contracts and those that are executed must evidently have been present to the mind of the learned Judge who prepared the act: the word "value" here being substituted for "price" in the 29 Car. 2, c. 3, s. 17; which latter word has more immediately and properly reference to goods that are in existence at the time of making the contract or bargain; whereas the word "value" has a more extended signification; so that, where the parties have omitted to fix a price, it is open to a jury to ascertain the value of the goods. The question then is, whether in this case there has been a sufficient note or memorandum of the bargain between the parties within the 17th section of the statute 29 Car. 2, c. 3. I am of opinion that there has. It is quite clear that there was a contract by the defendant on the one part and the plaintiff on the other. The particulars of the carriage to be built were minutely described; but it appears that the price was not at the time determined upon. By operation of law, therefore, it was a contract by the plaintiff to build, and by the defendant to purchase, a carriage of a given description for so much as it might be reasonably worth. Sir William Blackstone, in his Commentaries, treating of title to things personal by contract, says (g):—

(g) Book 3, c. 30, pp. 443, 4, 5.

"A contract or agreement may be either express or implied. *Express* contracts are where the terms of the contract are openly uttered and avowed at the time of the making; as, to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform: as, if I employ any person to do any business for me, or perform any work; the law implies that I undertook or contracted to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value."

"A contract for *any valuable* consideration, as, for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for, the person contracted with has then given an equivalent in recompense, and is therefore as much an owner or a creditor as any other person." "These valuable considerations are divided by the civilians into four species. The third species of considerations is, *facio ut des*: when a man agrees to perform any thing for a price either specifically mentioned or left to the determination of the law to set a value on it. And, when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth." That learned writer, therefore, considered that an implied contract is as strong to bind the parties as if made under their hands. So, here, as the contract for the purchase and sale of the carriage was altogether silent as to price, it is left to the law to determine its reasonable value by an investigation before a jury. This, it has been contended, lets in all the fraud and perjury which it was the sole ob-

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ject of the statute to prevent. That, however, does not appear to me to be an argument pertinent to the present case; for, in the memorandum of the contract, no specific price being mentioned, had the parol evidence shewn that a price had been agreed on, the memorandum would not have been evidence of the contract, according to the case of *Elmore v. Kingscote*. That case does not appear to me to have gone any further than some of the earlier decisions: the written contract made no mention of price; and the plaintiff gave verbal evidence that the horse was agreed to be sold for a fixed price; there was therefore no note or memorandum in writing of *the contract*, and the plaintiff was nonsuited. Thus the case stands upon the original order for the carriage. It is, however, material to observe, that, after the carriage was completed and seen by the defendant, he wrote to the plaintiff a letter which shews that he understood that he was to pay and meant to pay the plaintiff so much as the carriage might be fairly and reasonably worth; for, he desires the plaintiff to send in his bill. The defendant must at that time have known whether or not there had been a contract at a stipulated price. In this letter the defendant also requests the plaintiff to mention in his bill "all the items belonging to the carriage;" this shews that the price was not ascertained; but that the carriage was to be paid for according to its fair and reasonable value. Upon the whole I think the case is free from all difficulty; that all the requisites of the statute have been complied with; and therefore that the rule for setting aside the verdict that has been found for the plaintiff must be discharged.

Mr. Justice PARK.—I am of the same opinion. The question arises on the late Lord Tenterden's Act, 9 Geo. 4, c. 14, which is to be construed in pari materia with the statute of frauds, 29 Car. 2, c. 3, inasmuch as both use in effect the same words. The only doubt I entertained at

the time the rule was granted, arose from the case of *Elmore v. Kingscote*, as abstracted in the abridgments: but, on looking at the facts of that case (to which the language of the Court must be confined), it appears to me to be very distinguishable from the present. There, it was proved at the trial that there was an express bargain between the buyer and seller of the horse as to the price to be paid for it, and no price was mentioned in the written contract: the note or memorandum, therefore, did not disclose the real bargain between the parties. Lord Chief Justice Abbott said (*h*): "There must be a note in writing of *the bargain*; that is, of the *whole* bargain; and the price is a very material part of the bargain. This letter makes no mention of the price, and therefore it is not a note of the bargain. If we were to allow the plaintiff in such cases to prove the price agreed upon by parol evidence, we should be letting in much of that very mischief which it was the object of the statute to shut out." The bargain there having reference to a fixed price, our determination in this case does not in the least impeach the doctrine there laid down. It has uniformly been held that the note or memorandum of a bargain required by the statute of frauds need not be all on one piece of paper, or all written at the same time: it suffices that the terms of the contract can be collected from several documents (*i*). In *Saunderson v. Jackson*, the Court said: "Although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient; yet, as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given." Here, at the expiration of nearly a year from the date of the first order given by the defen-

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(A) 8 Dow. & Ryl. 344.

(i) See *Allen v. Bennet*, 3 Taun-

ton, 169, and *Jackson v. Lowe*, 7

J. B. Moore, 219, 1 Bing. 9.

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dant for the carriage, he wrote a letter to the plaintiff, requesting him to send in his bill, and stating that he wished to have the carriage out directly, as his harness had been finished for some time. Coupling, therefore, the original memorandum with this letter, which was written after the defendant had seen the carriage in its complete state, an inference necessarily arises that the defendant agreed to pay what the carriage might be found to be reasonably worth.

Mr. Justice GASELEE.—Upon the original memorandum, coupled with the defendant's second letter to the plaintiff, I entertain no doubt whatever; and I fully concur in what has fallen from my Lord Chief Justice and my Brother Park. Unless every addition or alteration made in the progress of a work require to be made the subject of a fresh memorandum in writing, I am of opinion that in this case the statute has been complied with. In the course of carrying into effect building contracts, extra work is frequently required, and omissions and alterations suggested during the progress of the work, and yet no additional memorandum has ever been supposed to be necessary. The memorandum produced at the trial was clearly a note or memorandum of the bargain between the parties. The defendant ordered the plaintiff to build for him a fashionable and handsome carriage of a particular description and style, which was to be finished and ready for the defendant's use on the 1st of March, 1833. No price appears to have been stipulated for, and none could have been expressed on the face of the memorandum. As, therefore, there was a note or memorandum of the *whole* bargain for the building of the carriage as far as the parties had agreed at the time the defendant gave the order, and it does not appear that there was any distinct bargain as to price made afterwards, I think the note contained all that was requisite, and therefore that the plaintiff is entitled to retain his verdict.

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Mr. Justice BOSANQUET.—I am of the same opinion. Two questions arise in this case—first, whether there was a sufficient note or memorandum in writing of the bargain between the plaintiff and defendant for the sale of the carriage—secondly, whether the carriage sent by the plaintiff to the defendant corresponded with the terms of the order. The principal objection that has been relied on for the defendant is, that the price of the carriage was not stated in the memorandum. This question depends upon the construction to be put on the statute 9 Geo. 4, c. 14, which places executory contracts for the sale of goods on the same footing with contracts executed under the statute of frauds, 29 Car. 2, c. 3: and, as the words of both statutes are very nearly the same, they must receive the same construction. If it be necessary to state the price of the goods contracted for in the note or memorandum of the bargain under the 9 Geo. 4, c. 14, it would have been equally incumbent on the parties to do so under the 29 Car. 2, c. 3. It is true that the terms of *the bargain* must be specified; and the parties must state the *whole* bargain or contract: but they need not go beyond it. A note omitting to state the price agreed on, where it appears by parol evidence that a specific price was agreed on, will not do: neither can a note of the bargain state a specific price when none has been settled. In *Elmore v. Kingscote*, the memorandum was silent as to price, and it was insisted that the plaintiff might recover the value of the horse on a quantum valebat; but, it being proved by parol evidence that a specific price had been agreed upon, the memorandum was held insufficient. Where a note or memorandum of a bargain for the sale or delivery of goods contains only general terms, the parties cannot be bound beyond what they stipulate for: but, if there be afterwards an agreement for price, that agreement must be evidenced by writing signed by the parties or their agents. Independently even of the statute 9 Geo. 4, c. 14, I am of opinion that the

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plaintiff is entitled to recover on a quantum valebat. The statute of frauds first required a note or memorandum of the bargain to be in writing. That has been done in the present case; and the terms of that statute, as well as of the 9 Geo. 4, c. 14, have been thus far complied with. But it has been contended that there was no note of a bargain between the parties for such a carriage as that which was ultimately tendered to the defendant. Now, the terms of the original order were general: the carriage was to be of a particular description; and, after it was completed, and had been seen by the defendant in its complete state, the latter wrote to the plaintiff, desiring him to send in his bill. Coupling the terms of that letter of the defendant with the original order, it appears to me to have been sufficiently shewn that the carriage tendered was the same that was the subject of the contract.

Rule discharged (*a*).

(d) See *Acebal v. Levy*, ante, p. 217. On a contract for the sale of a cargo of nuts, the memorandum was silent as to price. The special count founded thereon was framed upon an agreement to pay for the nuts "at the then shipping price at Gijon;" and such being the contract proved by the parol evidence at the trial, it was held to be a variance; in-

asmuch as the contract to be inferred by law from the written memorandum, was a contract to furnish a cargo, not at the price at the shipping port, but at a reasonable price—that is, such a price as the jury, upon the trial of the cause, should under the circumstances decide to be reasonable.

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**CLARKE, Administrator of MARY CHASTY, Deceased,
v. HOOPER and Others.**

*Thursday,
April 19th.*

ASSUMPSIT on a promissory note for 100*l.*, dated at Frome, the 15th of April, 1822, payable on demand, with interest at 4*½* per cent. from the date, and signed by John West, for Messrs. Hooper, Franklin, & West, bankers at Westbury and Frome. Plea, the statute of limitations.

Payment of interest upon a promissory note by the makers to the personal representative of the payee within six years before the commencement of the action:— Held, a sufficient acknowledgment to take the case out of the statute of limitations, although the letters of administration under which the party claimed to whom the payments were made were not obtained in the diocese in which the note was bonum notabile.

The cause was tried before Mr. Baron Williams at the last Assizes for Somerset. The facts disclosed in evidence were as follow:—One John Chasty in the year 1825 died intestate, leaving bona notabilia in the dioceses of Bath and Wells and Salisbury. The note in question was bonum notabile in Salisbury. Letters of administration were taken out by his sister Mary Chasty in the diocese of Bath and Wells only; under which she obtained possession of the note. Mary Chasty died in 1828; whereupon the plaintiff, her nephew, obtained letters of administration cum testamento annexo. In order to take the case out of the statute, the plaintiff relied upon indorsements of the payment of interest on the note, by John Chasty in April, 1825, and by Mary Chasty down to November, 1828 (a); and also on a payment of 40*l.* to the present plaintiff on account of principal and interest.

(a) The 1st section of the 9 Geo. 4, c. 14, which requires the acknowledgment of a debt to bar the statute of limitations to be in some writing to be signed by the party to be charged thereby," provides that "nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." And the 3rd section

provides "that no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, *by or on the behalf of the party to whom such payment shall be made*, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

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On the part of the defendants it was contended that the part payments relied on, being made to persons who, from the circumstance of administration not having been granted in the proper province, had no right to receive the money, did not amount to such an acknowledgment of the debt as would defeat the plea of the statute of limitations.

The learned Baron, reserving to the defendants leave to move to enter a nonsuit on the ground above stated, left the case to the jury, who returned a verdict for the plaintiff for 520*l.*, the sum due for principal and interest.

Mr. Serjeant Coleridge now moved accordingly.—Payment of interest to a stranger, as in this case, does not operate as an admission of a debt whence a promise to pay may be inferred. No promise can be inferred from an acknowledgment made to a mere stranger. Here, as Mary Chasty had obtained no letters of administration to enable her to deal with property in the diocese of Salisbury, the plaintiff as her administrator derived from her no right to sue on this note. The case of *Mountstephen v. Brooke* (*b*), where it was held that a deed made between the defendants and a third person, in which the former acknowledged the existence of a debt, was sufficient to take the case out of the statute, although the plaintiffs were wholly strangers to the deed, does not apply to indorsements of the payment of interest.

Lord Chief Justice TINDAL.—In this case the defendants have pleaded the statute of limitations in bar of an action brought against them on a promissory note of which they are the makers. In order to take the case out of the operation of the statute, the plaintiff has proved various payments on account of principal and interest due on the note made by the defendants within six years. These pay-

(*b*) 3 Barn. & Ald. 141.

ments, it has been contended, ought not to operate so as to defeat the plea, because they appear to have been made to parties having no strictly legal right to receive them—to administrators acting under letters of administration taken out in the wrong diocese. Now, what is the effect of the payments that have been made? Undoubtedly that of a direct acknowledgment of the debt in the minds of the parties who made the payments, and that so much money was really due from them at the time on account of interest. It appears to me to be precisely the same as if the defendants had written a letter acknowledging themselves to owe the money to whoever might be the rightful payee. I think the acknowledgment was a sufficient answer to the plea.

Mr. Justice PARK.—I am of the same opinion. Mary Chasty believed she had, and *prima facie* she had, a right to receive the money: she had obtained letters of administration, though not in the proper diocese. The payments however clearly amount to an acknowledgment of the debt.

Mr. Justice GASELEE and Mr. Justice ALDERSON concurring—

Rule refused (c).

(c) Payment of a debt barred by the statute of limitations does not revive the plaintiff's claim for

interest thereon—*Collyer v. Willock*, 12 J. B. Moore, 557, 4 Bing. 313.

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*Monday,
April 21st.*

The defendant being arrested, applied to a Judge to be discharged, on the ground of a supposed defect in the affidavit to hold to bail. The application being dismissed, the defendant requested the plaintiff's attorney to consent to receive certain persons as bail without opposition. The latter consented upon the understanding that the decision of the Judge was acquiesced in:— Held, that the defendant had waived the objection to the affidavit, and could not afterwards apply to the Court to enter an ex parte return on the bail-piece.

Semble, that an affidavit to hold to bail by the indorsee of a bill of exchange need not allege *by whom* the bill was indorsed to the plaintiff.

MAMMATT v. MATHEW.

THE defendant was arrested upon a writ of capias issued upon the following affidavit:—“ John Mammatt, of Ashby-de-la-Zouch, in the county of Leicester, Esq., maketh oath and saith that John Mee Mathew is justly and truly indebted to this deponent in the sum of 1487*l.* 1*s.*, as the indorsee of two several bills of exchange, both of them drawn upon and accepted by the said John Mee Mathew, and now respectively overdue and unpaid; one of the said bills being for the sum of 710*l.* 14*s.* 9*d.*, and the other for the sum of 776*l.* 6*s.* 3*d.*, making together the aforesaid sum of 1487*l.* 1*s.*”

An application was made to Mr. Justice James Parke, at Chambers, to discharge the defendant out of custody, on the ground of the alleged insufficiency of the above affidavit. That learned Judge, however, thought the affidavit sufficient, and refused to make an order. The defendant was subsequently discharged out of custody upon putting in certain bail, which the plaintiff's attorney at his request consented to accept without opposition. The cause went on to issue, and was set down for trial.

Mr. Serjeant *Talfourd*, on the first day of this term, obtained a rule nisi to enter an exoneretur on the bail-piece.—He submitted that the affidavit was defective in not shewing by whom the bills were drawn and indorsed. He cited *M' Taggart v. Ellice* (a), and *Lewis v. Gom-perts* (b), in both of which cases it was held, that, in an affidavit to hold to bail in an action by the indorsee of a bill or note, an omission to state by whom the indorsement was made to the plaintiff is fatal.

(a) 12 J. B. Moore, 326, 4
Bing. 114.

(b) 2 Cromp. & Jervis, 352, 1
Dowl. P. C. 319.

Mr. Serjeant *Wilde*, contra, submitted that the defendant had waived the objection (if any existed) to the affidavit, by his agreement with the plaintiff's attorney to put in bail if the latter would consent to accept them without opposition. He produced an affidavit made by the plaintiff's attorney, wherein he swore that, when the above agreement was entered into, it was distinctly understood that the decision of Mr. Justice James Parke was acquiesced in by all parties.

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Lord Chief Justice TINDAL.—I think the defendant has waived the objection.

The rest of the Court concurring—

Rule discharged (c).

(c) The cases upon this subject are conflicting. It is admitted in all of them that the affidavit must clearly point out the character in which the defendant's liability arises: and it would seem to follow as a necessary consequence that the plaintiff's title to sue should appear with equal certainty. The weight of authority, however, seems to be considerably in favour of the view taken by Mr. Justice James Parke. In *Bradshaw v. Saddington*, 7 East, 94, 3 Smith, 117, the affidavit stated that the defendant "was justly indebted to the plaintiff in 100*l.*, upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid;" without stating in what character the bill was due to the plaintiff, whether as payee or indorsee: and it was held sufficient. The authority of that case is ex-

pressly affirmed in *Elstone v. Mортlake*, 1 Chit. Rep. 648, *Machu v. Fraser*, 7 Taunt. 171, 2 Marsh. 483, *Lamb v. Edwards* and *Lamb v. Newcombe*, 5 J. B. Moore, 14, 2 Brod. & Bing. 343, *Warmsley v. Macey*, 5 J. B. Moore, 52, 2 Brod. & Bing, 338, *Bennett v. Dawson*, 1 Moore & Payne, 594, 4 Bing. 639, and *Hughes v. Brett*, 3 Moore & Payne, 566, 6 Bing. 239.

The only authorities contra are *Balbi v. Batley*, 6 Taunt. 25, 1 Marsh. 424, *Humphries v. Winslowe*, 6 Taunt. 531, 2 Marsh. 231, *M'Taggart v. Ellice*, 12 J. B. Moore, 326, 4 Bing. 114, *Lewis v. Gompertz*, 2 Cromp. & Jervis, 352, 1 Dowl. P. C. 319, and *Woolley v. Escudier*, ante, Vol. 2, p. 392. And it is to be observed that in none of these cases was there any considerable discussion, nor was the attention of the Court in any of them called to either of the

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Practice as to
the entry of a
nolle prosequi
by the demand-
ant in a writ of
intrusion.

WILLIAMS, Defendant, HARRIS, Tenant.

THIS was a writ of intrusion (*a*). The defendant proposing to enter a nolle prosequi, the officer refused to receive it without the direction of the Court or a Judge. Application was afterwards made to Mr. Justice Alderson, at Chambers. That learned Judge said that the plaintiff must enter it upon his own responsibility.

Mr. Serjeant *Stephen* now prayed that the Court would direct the officer to make the entry in the usual way; it being competent to the defendant (as he contended) to enter a nolle prosequi at any stage of the proceedings—even after issue joined.

PER CURIAM.—The defendant may go to the office, and the nolle prosequi may be entered *de bene esse*. The tenant may afterwards apply for his costs, or to set aside the nolle prosequi for irregularity; and then the question will be raised.

cases noticed in the preceding paragraph. It is also worthy of remark that *Bradshaw v. Saddington* has never been mentioned without its authority being acquiesced in by the Courts.

It would seem from the decision of the Court in the case in the text, that they inclined to the opinion expressed by Mr. Justice

James Parke; for, where an affidavit is so framed that perjury could not be assigned thereon, the defect is one that cannot be cured by waiver—*Watson v. Walker*, ante, Vol. 1, p. 437.

(*a*) By the 3 & 4 Will. 4, c. 27, s. 36, the proceeding by writ of intrusion is abolished after the 31st of December, 1834.

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STANNARD v. ULLITHORNE, HAMILTON, and CROMPTON.

THIS was an action brought against the defendants, solicitors, to recover compensation for damages alleged to have been sustained by the plaintiff, their client, through the negligence of the defendants in allowing the plaintiff (without properly advising him of the extent of his liability) to execute an assignment of a moiety of certain premises for a definite term and with a general covenant for title, when his interest therein was determinable upon lives.

The first count of the declaration stated, that, before the making of the promise and undertaking of the defendants next mentioned, to wit, on the 26th February, 1825, in &c., by a certain indenture then and there made, or purporting to be made, between one George Scott, therein described as guardian of the person and estate of one Georgiana Scott, his daughter, of the first part, one Seanah Stoe Clement, therein also described, of the second part, and John Lock of the third part, the said George Scott, as to one undivided moiety of the messuage and premises with the appurtenances thereafter mentioned and described, did demise unto the said John Lock, and the said Seanah Stoe Clement, as to the other undivided moiety thereof, did also demise unto him, the said messuage and premises, with the appurtenances—to hold one undivided moiety thereof, that is to say, the moiety of the said Georgiana Scott, from the 25th December then last past, for the term of eleven years if the said Georgiana Scott should so long live; at and under a certain rent to her payable in that behalf; and to hold the other undivided moiety for the same term, provided the said Seanah Stoe Clement should so long live, at and under a certain rent to her payable in that behalf; and in and by the same in-

The plaintiff being the assignee of a term of years determinable as to one moiety on the death of A., and as to the other moiety on the death of B., employed the defendants as his attorneys on the assignment of his interest in the premises to one J. The defendants permitted the plaintiff on that occasion to execute an assignment containing an absolute and unqualified covenant for title, and a covenant for quiet enjoyment for the whole term if A. and B. should so long live, "without any lawful let, suit, hindrance, interruption, or denial of the plaintiff; his executors or administrators, or of any other person or persons whomsoever;" notwithstanding they were at the time aware that B., one of the cestuis que vie, had been dead some years, unknown to the assignee:— Held, that the defendants were bound to explain to the plaintiff the consequences that might result to him from entering into such covenants; and that the fact of the plaintiff himself being at the time aware of the death of B. afforded no answer to an action against them for negligence.

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denture the said John Lock did covenant (amongst other things) for the payment of the said rent and the repair of the said premises with the appurtenances in manner therein mentioned in that behalf; and, after the making of the same indenture, but before the making of the same promise and undertaking, to wit, on the 21st September, 1826, in &c., by a certain indenture then and there made or purporting to be made between the said John Lock, therein described, of the one part, and the plaintiff of the other part, reciting as therein is recited, and also reciting that the said John Lock had before then agreed to sell unto the plaintiff all the premises aforesaid for the residue of the said term of eleven years, together with the goodwill of a certain trade theretofore carried on thereupon, and that the said John Lock had agreed to assign over the said lease and goodwill to the plaintiff, he the said John Lock, for the considerations therein mentioned, and for the carrying the said agreement into effect, did grant, bargain, sell, assign, transfer, and set over unto the plaintiff, his executors, administrators, and assigns, the premises before mentioned, with the appurtenances—to have and to hold the same, with the appurtenances, unto the plaintiff, his executors, administrators, and assigns, from the 29th September next ensuing the date of the first-mentioned indenture, for and during all the rest, residue, and remainder which should be then to come and unexpired of the said term of eleven years therein, subject as therein mentioned, that is to say, to the payment of rent and performance of covenants as therein mentioned; and the said John Lock did then and there and thereby covenant with the plaintiff in manner following, that is to say, that, for and notwithstanding any deed, matter, or thing whatsoever by him the said John Lock at any time theretofore made, done, committed, or knowingly occasioned, suffered, or omitted to the contrary, the said thereinbefore in part recited indenture of lease was, at the time of the sealing and delivering of the first mentioned

indenture, a good, valid, and effectual lease in law and in equity for the premises thereby expressed to be demised, and thereby assigned, or intended so to be, and that the same and the term of eleven years therein expressed were respectively in full effect and in no wise forfeited, surrendered, assigned, determined, or otherwise become void or voidable or prejudicially affected in any manner howsoever than by effluxion of time; and that the yearly and other rents in and by the same indenture of lease reserved, and all arrears thereof, and also all taxes, rates, and assessments charged upon the said premises or the tenant or occupiers thereof for the time being for or in respect of the same, had been and were or would be well and truly paid and satisfied up to the 29th September then next, and the several covenants and conditions and agreements therein contained on the part of the tenant or lessee of the same premises required to be performed and observed had been well and truly performed and observed down to the date of the first-mentioned indenture; and also that, for and notwithstanding any such act, deed, matter, or thing, he the said John Lock had in himself full power and lawful and absolute authority to bargain, sell, transfer, and assign the said messuage or tenement and all and singular other the premises thereinbefore assigned or expressed so to be, and every part and parcel thereof, with their respective rights, members, and appurtenances, unto the plaintiff, his executors, administrators, and assigns, for and during all the residue and remainder which was to come and unexpired by effluxion of time of or in the said term or period of eleven years so thereof or therein granted as aforesaid in manner aforesaid, according to the true intent and meaning of the first-mentioned indenture; and further, that he the plaintiff, his executors, administrators, and assigns, should or lawfully might, immediately after the execution of the same indenture, and from time to time and at all times thereafter during the residue and remainder which from

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the 29th September then next was to come and unexpired by effluxion of time of the said term of eleven years by the said in part recited indenture of lease granted as aforesaid, peaceably and quietly enter into and upon, and have, hold, use, occupy, possess, and enjoy all and singular the said messuages or tenements, and other the premises thereby assigned or intended so to be, with their and every of their rights, members, and appurtenances, for and during such residue and remainder of the said term, and receive, take, and retain the rents, issues, and profits thereof which should or might arise or become payable from the said 29th September next, to and for their own proper use and benefit, without any action, suit, eviction, hindrance, disturbance, or interruption whatsoever, of or by the said John Lock, his executors or administrators, or any person or persons now or thereafter rightfully claiming or possessing any estate, right, title, charge, or interest in, to, or out of or upon the said premises, or any part thereof, by, from, or in trust for him or them, or by and through his or their acts, deeds, defaults, means, consent, or privity, and that free and clear, and clearly and absolutely acquitted and discharged or otherwise by and at the expense of the said John Lock, his executors or administrators, well and effectually protected, indemnified, and kept harmless from and against all former and other assignments, estates, rights, titles, trusts, interests, charges, payments, and incumbrances whatsoever which at any time theretofore had been, or which at any time thereafter should or might be committed, created, or knowingly occasioned or suffered by him the said John Lock or any person or persons then or thereafter claiming or possessing any legal or equitable estate, right, title, trust, or interest by, from, under, or in trust for him (save and except the rent and rents in and by the said thereinbefore in part recited indenture of lease reserved, from the said 29th September next, and the covenants and agreements therein

contained on the part of the tenants, lessees, or assignees of the said premises from thenceforth to be performed and observed during the then residue of the said term of eleven years); and further that he the said John Lock, his executors and administrators, and all and every persons or person claiming under him or them, should execute further assurance or assurances, at the request and at the costs of the plaintiff, in manner and form as in the same indenture mentioned. That, after the making of the said indenture and the same demise of the said premises to the plaintiff, to wit, on the 1st January, 1829, in &c., by a certain agreement or memorandum of agreement then and there made and entered into between the plaintiff and one Robert James, it was mutually agreed in manner following, that is to say, that they the plaintiff and the said Robert James should and would enter into partnership with each other, and become equal partners together, that is to say, as wine merchants, from the day and year last aforesaid, upon certain terms in the said agreement expressed, that is to say, amongst others, that the capital of such joint business, including the lease of the house and premises whereon the same was to be carried on, that is to say, the first-mentioned indenture of lease and the premises aforesaid, should be a certain sum then and there fixed and specified; and, for the consideration therein mentioned, the plaintiff thereby agreed to assign to the said Robert James, his executors, administrators, and assigns, one full, equal, and undivided moiety, half part, or share of, in, and to the same lease and the premises thereby demised, for all the residue of the term of years then to come therein, subject only to one moiety of the rent and taxes and covenants payable and to be performed for the same; and it was then and there thereby agreed that articles of partnership should be forthwith prepared and executed, which should contain all such usual stipulations and covenants as are generally inserted

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in partnership deeds of the like nature; and, before the making of the said agreement or memorandum of agreement, to wit, on the 1st December, 1828, in &c., the plaintiff, at the special instance and request of the defendants, employed and retained the defendants as his attorneys and solicitors in and about and in respect of the said agreement and the said intended partnership, and the said assignment of the said moiety of the said premises, and all matters relating to or connected with the same and necessary to be done or executed for the purpose of completing and effectuating the same; and, in consideration thereof, and of certain reasonable fees and reward to the defendants in that behalf, they the defendants, to wit, on the day and year last aforesaid, in &c., undertook and then and there faithfully promised with and to the said plaintiff well and truly to perform and execute their duty as attorneys and solicitors in that behalf, and to take due and proper care, and duly provide for and protect the interests of the plaintiff in and about the counselling and advising the plaintiff in and about the said intended partnership, and in and about the preparing, perusing, settling, and advising on all and every deed or deeds, assignment or assignments, instrument or instruments, matter or thing whatsoever relating to the said intended agreement, partnership, and assignment, and necessary for the completing and effectuating of the same as aforesaid: and the plaintiff said, that, after such retainer and promise, and for the purpose of completing and effectuating the said partnership, the plaintiff, under and with the advice and consent of the defendants as such attorneys and solicitors, to wit, on &c., did enter into the said agreement with the said Robert James as last aforesaid; and thereupon it then and there became and was necessary for the plaintiff to assign over to the said Robert James, his executors, administrators, and assigns, one full, equal, and undivided moiety of the same premises, according to the provision of the said

agreement in that behalf; and a certain indenture of assignment of such moiety had been and was drawn up and prepared by and on the behalf of the said Robert James, and a draft or copy thereof, prior to the execution of the same, to wit, on the 16th January, 1829, in &c., had been and was duly delivered to and laid before the defendants, as such attorneys and solicitors as aforesaid, to peruse, settle, and advise upon the same for and on the behalf of the plaintiff, and the defendants then and there had full notice of the premises, and of all and every the indentures, agreements, and instruments hereinbefore mentioned relating to the said premises, and of the contents and purport thereof; and it then and there thereby became and was the duty of the defendants, as such attorneys and solicitors, and by reason of their said retainer and undertaking, carefully and heedfully to peruse and settle the same assignment, or draft or copy thereof, and to take care that no unusual nor unnecessary clauses, stipulations, or covenants, clause, stipulation, or covenant, by or on behalf of the plaintiff, was or should be included or inserted therein; and that he the plaintiff should not be exposed or rendered liable to any unnecessary risk, loss, or liability by reason of his executing or becoming a party to the same assignment; and in all respects duly and properly to advise and caution the plaintiff in respect of the same: yet the defendants then and there wholly neglected their duty in that behalf, and conducted themselves so carelessly, negligently, and unskilfully in respect of the premises, that, by and through the mere neglect, carelessness, and negligence of the defendants in respect of the premises, and by and upon the advice and counsel of the defendants, as such attorneys and solicitors as aforesaid, he the plaintiff, to wit, on the 19th January, 1829, in &c., did bargain, sell, assign, transfer, and set over, and covenant unto and with him the said Robert James in manner and form following, that is to say, by a certain indenture made or purporting to be

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made on or about the 19th January, 1829, between the plaintiff of the one part, and the said Robert James of the other part, reciting as therein is recited, that is to say, reciting the before-mentioned demise to the said John Lock, and the first-mentioned indenture, and also that the said Robert James had contracted for the purchase of a moiety of the said premises for the residue of the said term or estate thereby created therein, he the plaintiff, for the consideration therein mentioned, did then and there bargain, sell, assign, transfer, and set over unto the said Robert James, his executors, administrators, and assigns, one equal undivided moiety or half part of and in the said premises with the appurtenances—to have and to hold the said one equal and undivided moiety or half part thereby assigned unto the said Robert James, his executors, administrators, and assigns, for the residue and remainder from the 25th December then last past to come and unexpired of the said several terms of eleven years, provided the said Georgiana Scott should so long live, and of eleven years, provided the said Seanah Stoe Clement should so long live; subject, nevertheless, to the payment of one moiety or equal half part of the rents of the same premises, and to the observance and performance, and to one moiety or equal half part of all costs and expenses which from the said 25th December then last past should or might be occasioned, disbursed, or expended in or by the observance and performance of the covenants and agreements to be paid, observed, and performed in respect of the same; and the plaintiff did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said Robert James, his executors, administrators, and assigns, in manner following (that is to say), that the said thereinbefore-recited indenture of lease was, at the time of the sealing and delivery of the same indenture, a good and effectual lease, valid in the law, and still subsisting, and not surrendered, forfeited, or be-

come void or voidable in any manner howsoever; and that the rents, covenants, and agreements in the said recited indenture of lease reserved or contained on the tenant's or lessee's part or behalf to be paid, observed, performed, and kept, were and had been, up to the said 25th December then last past, well and truly paid, observed, performed, and kept; and further, that he the plaintiff, at the time of the sealing and delivering of the same indenture, had in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, and assign the said one equal and undivided moiety or half part mentioned to be thereby assigned of and in the said messuage and premises, with their appurtenances, unto the said Robert James, his executors, administrators, or assigns, in manner aforesaid, according to the true intent and meaning of the same indenture; and further, that it should and might be lawful to and for the said Robert James, his executors, administrators, and assigns, to enter into and upon the said one equal undivided moiety or half part of and in the said messuage and premises, and the same peaceably and quietly to have, hold, and enjoy, and take the rents, issues, and profits thereof to his and their own use and benefit for and during all the residue and remainder from the said 25th December then last past to come and unexpired of the several terms therein of eleven years if the said Georgiana Scott should so long live, and of eleven years if the said Seanah Stoe Clement should so long live, without any lawful let, suit, hindrance, interruption, or denial of the plaintiff, his executors or administrators, or of any other person or persons whomsoever; and that free and clear, and freely and clearly acquitted, exonerated, and discharged of, from, and against all former and other titles, charges, liens, and incumbrances whatsoever; as by the said indenture, reference being thereto had, will more fully and at large appear: and the plaintiff said, that, in and about the becoming a party to

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and executing the same indenture of assignment, he wholly confided in, and acted, followed, and abided by the counsel and advice of the defendants, then and there being and acting as the attorneys and solicitors of the plaintiff as aforesaid; and that, prior to his so becoming a party to and executing the said indenture, to wit, on the 15th day of January, 1829, in &c., a draft or copy of the same had been and was perused and settled by the defendants as such attorneys as aforesaid on his behalf: nevertheless the said plaintiff said that the covenants and stipulations in the same indenture of assignment contained by and on the part of the plaintiff were and are unusual and unnecessary covenants and stipulations, and larger, fuller, and more extensive covenants and stipulations than it was necessary to include, or than ought to have been included in the same indenture of assignment under or in pursuance of the said agreement for the assignment of the said moiety, or of the practice or custom in the case and in respect of such assignments usually followed and pursued, that is to say, insomuch as in and by the same indenture the plaintiff did covenant absolutely and without qualification that the hereinbefore-recited indenture of lease, that is to say, the before-mentioned lease to the said John Lock, was a good and effectual lease, valid in the law, and then subsisting, and not surrendered, forfeited, or become void or voidable in any manner howsoever; and that he the plaintiff, at the time of executing the same indenture, had good right and full power to assign in manner and form aforesaid; and that it should be lawful for the said Robert James, his executors, administrators, and assigns, to enter upon and enjoy the moiety so assigned for the residue of the same terms, without any lawful let or interruption of the plaintiff or for any other person or persons whomsoever; and that free and clear, and freely and clearly acquitted, exonerated, and discharged of, from, and against all former and other titles, charges,

liens, and incumbrances whatsoever, in manner and form aforesaid: and although, by so becoming a party to and executing the same indenture of assignment as aforesaid, the plaintiff incurred a great and unnecessary liability, yet no caution, warning, or advice thereof was then and there, nor at any other time prior to his becoming a party to and executing the same, given to him by or on the behalf of the defendants, who then and there permitted and suffered the plaintiff to execute, and the plaintiff did execute the same indenture of assignment in entire ignorance that he was thereby incurring any liability greater or more extensive than by reason of the situation of the parties and the agreement between them, and the usual practice in such cases, and, for the purpose of fully and properly completing the said assignment, he ought and was bound to have incurred: and the plaintiff said, that, before the making of the same indenture of assignment, to wit, on the 7th September, 1825, in &c., the said Seanah Stoe Clement died; whereupon and whereby the said lease and demise to the said John Lock became and was voidable and void, and wholly ceased, ended, and determined as to one undivided moiety of the said premises with the appurtenances, that is to say, as to the undivided moiety of the same in the said indenture of lease secondly mentioned, to wit, in &c. aforesaid; and thereupon and thereby a certain person, to wit, one George Scott, after the said assignment to the said Robert James, to wit, on the 30th April, 1831 (which said George Scott had become and was lawfully entitled to the last-mentioned moiety of the same premises with the appurtenances), entered into and upon the same, and by due process of law ejected and expelled the said Robert James from and out of the possession and occupation of such undivided moiety, and enjoyed the same, and kept the said Robert James so expelled and dispossessed for a long space of time, to wit, from thence hitherto; and thereupon a certain action was commenced and prosecut-

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ed by and on the behalf of the said Robert James against the plaintiff, to recover the damages sustained by him the said Robert James by his being so dispossessed of and expelled from the said undivided moiety as aforesaid, and by his being put to divers great costs and expenses in and about defending his said possession, and otherwise in respect of the same, that is to say, a certain action of covenant upon the covenants in the said indenture by and on the part of the plaintiff contained; and such proceedings were thereupon had, that, afterwards, and by reason of the same covenants and each of them being so absolute and unqualified as aforesaid, to wit, on the 1st March, 1832, in &c., the plaintiff was adjudged and compelled and obliged to pay, and did pay to the said Robert James a large sum of money, to wit, the sum of 875*l.* 11*s.* 7*d.* as and by way of damages by him the said Robert James sustained by and by reason of his being so expelled and dispossessed as aforesaid, and as damages for the breach of the said covenants in the said indenture of assignment contained, and also for costs by him the said Robert James incurred in respect of the premises; and the plaintiff had also been put to great costs and expenses in and about defending the said action, and in and about proceedings connected therewith, amounting to a large sum, to wit, the sum of 200*l.*, to wit, &c.

The declaration contained other three special counts, the common money counts, and a count upon an account stated. The defendants pleaded the general issue.

The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster after last Michaelmas Term. Georgiana Scott and S. S. Clement, being respectively entitled to undivided moieties of a certain messuage and premises as tenants for life, on the 26th of February, 1825, demised the same to one John Lock, to hold one undivided moiety thereof from the 25th of December, 1824, for the

term of eleven years, if Georgiana Scott should so long live, and the other undivided moiety for the same term, provided S. S. Clement should so long live. Mrs. Clement died in September, 1825.

On the 21st September, 1826, Lock assigned the premises to the plaintiff for all the residue of the said term. In this assignment, which was prepared by the defendant Ullithorne, who had before him the original lease, Lock covenanted, that, "for and notwithstanding any act, deed, matter, or thing whatsoever *by him the said John Lock* at any time theretofore made, done, committed, or knowingly occasioned, suffered, or omitted to the contrary, the said thereinbefore in part recited indenture of lease was, at the time of the sealing and delivering of the first-mentioned indenture, a good, valid, and effectual lease, in law and in equity, of and for the premises thereby expressed to be demised, and thereby assigned or intended so to be, and that the same and the term of eleven years therein expressed were respectively in full effect, and in no wise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or judicially affected in any manner howsoever than by effluxion of time, &c." Lock further covenanted for quiet enjoyment "without any action, suit, eviction, hindrance, disturbance, or interruption whatsoever of or by the said John Lock, his executors or administrators, or any person or persons then or thereafter rightfully claiming or possessing any estate, right, title, charge, or interest in, to, or out of or upon the said premises, or any part thereof, by, from, or in trust for him or them, or by or through his or their acts, deeds, defaults means, consent, or privity, &c." At the time this assignment was executed, neither the plaintiff nor Ullithorne was aware of the death of Mrs. Clement.

In the month of January, 1829, Ullithorne was employed by the plaintiff as his attorney in the negotiation of a partnership about to be entered into between the plaintiff

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and one Robert James; in furtherance of which the plaintiff had agreed to assign to James a moiety of his interest in the premises for the sum of 350*l.*; and accordingly on the 16th of that month a draft of an assignment, prepared by James's attorney, was delivered to and approved by Ullithorne on behalf of the plaintiff. The assignment was executed by the plaintiff on the 19th of January; the plaintiff therein covenanting "that the thereinbefore-recited indenture of lease was at the time of the sealing and delivering of the same indentures a good and effectual lease, valid in the law, and still subsisting, and not surrendered, forfeited, or become void or voidable in *any manner howsoever*;" and also for quiet enjoyment by James "for and during all the residue and remainder to come and unexpired of the said several terms therein of eleven years if the said G. Scott should so long live, and of eleven years if the said S. S. Clement should so long live, without any lawful let, suit, hindrance, interruption, or denial of the plaintiff, his executors or administrators, or of *any other person or persons whomsoever*; and that free and clear, and freely and clearly acquitted, exonerated, and discharged of, from, and *against all former and other titles, charges, liens, and incumbrances whatsoever.*"

The partnership between the plaintiff and James was shortly afterwards dissolved; upon which occasion the plaintiff assigned his share in the premises to James, who thereby became possessed of all that remained of the interest conveyed by the lease of the 26th February, 1825. There was evidence to shew, that, at the time the assignment from the plaintiff to James was executed, viz. on the 19th January, 1829, the plaintiff and Ullithorne were both aware of the fact of Mrs. Clement's death: but Ullithorne did not explain to the plaintiff the probable consequences that might result to him from his entering into the general covenants contained in the assignment to James, or the risk he thereby incurred.

In April, 1830, James was ejected from the moiety of the premises, the term in which had determined on the death of Mrs. Clement; and thereupon brought an action against the present plaintiff for compensation by virtue of the covenants for title and warranty contained in the assignment of the moiety of the premises executed by the plaintiff at the time of the partnership. The cause was referred to Mr. Serjeant Merewether, who awarded a considerable sum to James by way of compensation. Ullithorne acted as the attorney for the present plaintiff on that occasion; when he admitted that he was aware of the death of Mrs. Clement at the time of the execution of the assignment to James.

Ullithorne was not a partner with the other defendants at the time the transaction in question took place, but had become so before the commencement of this action.

On the part of the plaintiff, a practising conveyancer, and several other professional men were called. They proved, that, according to the usual practice in cases of a similar description, the covenants in question should have been restrained to covenants against the acts of *the assignor* only.

For the defendants it was contended, that, inasmuch as the plaintiff was aware of the death of Mrs. Clement (and must also be taken to have been aware of the consequent determination of the lease as to one moiety of the premises) at the time he took James into partnership, and executed the assignment to him, receiving from him a large sum of money by way of consideration, he was in justice bound to enter into covenants to indemnify James.

His Lordship told the jury that the only question for their consideration was, whether the plaintiff knew of the death of Mrs. Clement before he entered into the contract with James: and, in answer to a question from one of the jury, he said, that, if the plaintiff was aware of that fact, his ignorance of its effect was immaterial. The jury found

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a verdict for the plaintiff. The damages were agreed to be referred to an arbitrator.

Mr. Serjeant *Jones*, in Hilary Term last, obtained a rule nisi for a new trial, on the ground urged at the trial, and also on the ground of surprise (a).

Mr. Serjeant *Wilde* now shewed cause.—Whether at the time of executing the assignment to James the plaintiff knew that Mrs. Clement was dead or not, still it was the duty of the defendant Ullithorne to apprise him of the responsibility he would incur by the execution of an assignment containing the unusual covenants that were required by James's attorney. If the plaintiff had been acquainted with the legal consequences, he never would have entered into such covenants. In *Allison v. Rayner* (b), it was held that an attorney could not recover from the assignee of an insolvent debtor the amount of a bill of costs incurred in proceedings requiring the consent of a meeting of creditors, without proving that such consent was obtained, or that the client was informed he was proceeding at his own risk. Lord Tenterden there said (c): “It is an important part of the jurisdiction of this Court, to see that their officers perform their duty towards their clients. Here it was the duty of the attorney to inform his client, that, if he proceeded further than an arrest on mesne process, without the consent of a meeting of creditors, he would do it at the risk of paying the costs out of his own pocket.” In the present case, the fact of the

(a) The alleged surprise was this:—The defendants put in evidence a paper, the contents of which they expected would be proved by the plaintiff's son; but it turned out not to be in his handwriting. This paper the de-

fendants relied on to shew that the plaintiff was aware of Mrs. Clement's death.

(b) 1 Man. & Ryl. 241, 7 Barn. & Cress. 441.

(c) 1 Man. & Ryl. 244.

plaintiff's knowledge of the death of Mrs. Clement is negatived by the finding of the jury: and even if that fact had been established, the liability of the defendants would have been the same: it was their duty to explain to the plaintiff the legal consequences of that event; and in this they have failed.

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Mr. Serjeant *Atcherley* and Mr. Serjeant *Talfourd*, in support of the rule.—The three defendants were not jointly concerned in preparing or advising on the assignment from the plaintiff to James: they were not then in partnership together; Ullithorne alone acted on that occasion as the attorney for the plaintiff. [Lord Chief Justice *Tindal* referred to *Jacaud v. French* (d). A. being partner with B. in one mercantile house, and with C. in another, the house of A. & B. indorsed a bill to the house of A. & C., after which B., acting for the house of A. & B., received securities to a large amount from the drawer of the bill, upon an agreement by B. that the bill should be taken up and liquidated by B.'s house, and, if not paid by the acceptors when due, should be returned to the drawer: it was held, that, the securities being paid, and the money received by B. in satisfaction of the bill, A. was bound by this act of his partner B., whether in fact known to him or not at the time; and therefore that he could not in conjunction with C., his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with B., in discharge of the same.] Where the client is aware of the fact of his lease being determined, his attorney is not bound to inform him of it. [Lord Chief Justice *Tindal*.—At least he must not, whilst acting as his professional adviser, allow his client to treat a determined lease as subsisting.] If the

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plaintiff knew of the death of Mrs. Clement, he must also be taken to have been cognizant of the legal effect wrought by that event. He received from James half the estimated value of the entire premises, as if the title were perfect: it was but fair, therefore, that he should enter into covenants to indemnify James against the consequences of Mrs. Clement's death. The plaintiff having received from James the full value of the premises, supposing the entire term to be continuing, nothing but an absolute covenant for title would satisfy the justice of the case.

Lord Chief Justice TINDAL.—I see no ground for disturbing this verdict. It is a well established principle, that an attorney, by reason of the emoluments he receives for the exercise of his professional skill, is bound to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than in the ordinary course the nature of the business he is instructed to transact may require. If an attorney permits his client to enter into stipulations more onerous in their consequences than are usually required, he is bound to explain those consequences to him. It appears that the defendant Ullithorne has allowed this plaintiff to enter into covenants that are unusual on the assignment of a lease from one assignee to another. It was proved on the part of the plaintiff, by a practising conveyancer, and by several other professional men, that *they* would not have introduced such covenants; and no evidence was adduced on the other side to shew that the covenants were necessary in the particular case. As, therefore, the covenants in question were unusual, it was incumbent on the defendants to shew, if such were the fact, that Ullithorne explained to the plaintiff, at the time he executed the assignment, the consequences that might result to him from a breach of those covenants. The defence relied on is, that the plaintiff was at the time of executing the as-

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signment aware of the death of Mrs. Clement, upon whose life depended a moiety of his interest in the premises assigned; and that the covenants in question were inserted in justice to the assignee. Supposing the plaintiff to have been aware of the death of Mrs. Clement, it by no means follows that he was cognizant of the legal consequences flowing from that event. I left the case to the jury on the single point whether or not the plaintiff knew at the time of the assignment that Mrs. Clement was dead. But I had also intended to leave it to them to say whether or not the plaintiff was aware of the legal consequences that would result from her death. I think it was clear upon the evidence given at the trial that the plaintiff was not aware of those consequences; and the inference to be drawn from the paper now produced, and upon which the defendants have relied for obtaining a new trial on the ground of surprise, seemed to me to point to the same conclusion. I am far from thinking that the plaintiff knew that he had assigned to James that which was in fact of no value. But the defendant Ullithorne must have known it; for, he had before him the original lease, which was determinable on the deaths of Mrs. Scott and Mrs. Clement, when in 1826 he prepared the assignment to the plaintiff. When, therefore, the second assignment was prepared in 1829, Ullithorne was fully apprised of the nature of the title which he had so recently before investigated; and, knowing that Mrs. Clement was dead, he must have been aware that the covenants introduced into the second assignment were not such as he ought to have allowed his client to enter into. Now, it is perfectly clear, from his own admissions on the occasion of the arbitration between the plaintiff and James, that Ullithorne knew of the death of Mrs. Clement, and was fully aware of the effect that event would produce on the plaintiff's title. It was therefore his duty to explain to his client the situation in which he

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stood, and the nature of the obligations the covenants he was about to enter into would impose upon him, instead of allowing him to execute the assignment in ignorance of its probable consequences. I therefore think the rule must be discharged.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—I am also of opinion that this verdict ought not to be disturbed. It is perfectly clear that the defendant Ullithorne has not in preparing the assignment in question used sufficient care or attention to the interests of his client. The covenants he allowed to be introduced into the indenture were *prima facie* unusual covenants; and, if any reason existed for their introduction, the defendants ought to have shewn it. The defendants rely on the fact of the plaintiff being aware at the time that Mrs. Clement was dead; and they contend that it must thence be inferred that he also knew that his interest in one moiety of the premises was thereby determined. There was, however, no evidence to shew that he was aware of the legal effect of Mrs. Clement's decease. Ullithorne must have known to what extent the plaintiff's interest in the premises was affected by that event; and therefore he ought not to have allowed the plaintiff to execute an assignment containing covenants like those in question: or, at all events, he was bound to apprise his client of the probable consequences, and of the risk he subjected himself to by entering into such covenants.

Mr. Justice ALDERSON.—I entirely concur in the conclusion to which the rest of the Court have come. The question left to the jury was not simply whether or not the plaintiff, at the time he executed the assignment to James, knew of the death of Mrs. Clement; but also, virtually,

whether he was aware of the legal consequences that would result to him from that event—viz. that the lease had expired so far as her moiety was concerned. Although he might have known that Mrs. Clement was dead, it by no means follows that he knew how that would affect his rights. Indeed, it would not in my opinion have afforded an answer to this action, to shew that the plaintiff and James had both been aware of the effect produced by the death of Mrs. Clement: the defendant Ullithorne still was bound to explain to his client the consequences that might result to him from entering into the covenants contained in the assignment; the latter would then have had an opportunity to consider whether or not he would enter into such covenants.

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Rule discharged (e).

(e) See <i>Wilson v. Tucker</i> , 3 Stark. 154, Dowl. & Ryl. N. P. C. 30— <i>Bourne v. Diggles</i> , 2 Chit. Rep. 311— <i>Browning v. Wright</i> , 2 Bos. & Pull. 13— <i>Knights v. Quarles</i> , 4 J. B. Moore, 532, 2 Brod. & Bing.	102— <i>Ireson v. Pearman</i> , 5 Dow. & Ryl. 687, 3 Barn. & Cress. 799— <i>Howell v. Young</i> , 5 Barn. & Cress. 259, 2 Car. & Payne, 238— <i>Drax v. Scroope</i> , 2 Barn. & Adolph. 581, 1 Dowl. P. C. 69.
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MUMMERY v. CAMPBELL.

Thursday,
April 24th.

THE defendant was discharged out of custody on the ground that she was a married woman and had been arrested by a wrong name. The rule for her discharge was silent as to the costs of the application. The plaintiff afterwards took out a rule to discontinue the action, on payment of costs. On taxation, the Prothonotary refused to allow the defendant the costs of the application for her discharge, on the ground that they were not costs in the cause.

The costs of a motion by a female defendant to be discharged out of custody on the ground of coverture, or that she has been arrested by a wrong name, are not costs in the cause, and therefore not taxable on a discontinuance of the action.

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Mr. Serjeant *Andrews* now moved that the Prothonotary might be directed to review his taxation in this respect.

Mr. Serjeant *Bompas* shewed cause in the first instance.—He submitted that the motion by the defendant to be discharged out of custody was a matter wholly collateral to the cause; and that the application was to the favour of the Court, who would at the time have allowed the defendant her costs of the motion, had the circumstances of the case been such as to warrant it.

Mr. Justice PARK.—If the plaintiff had proceeded in the action and had obtained a verdict, these costs would not have been costs in this cause.

Mr. Justice ALDERSON.—The motion was quite collateral: the only effect of it was to deprive the plaintiff of special bail; the cause might have proceeded as before.

The rest of the Court concurring—

Rule refused.



Thursday,
 April 21st.

SIMS v. JAQUEST.

THE plaintiff and defendant were both stone-masons. The former arrested the latter for a sum of 27*l.* 1*s.*, alleged to be due to him for work done and stone sold to the defendant. The defendant pleaded a set-off, and at the trial a set-off claimed by the defendant for goods sold to the plaintiff:—Held, that the defendant was entitled to his costs under the 43 Geo. 3, c. 46, s. 3, although the set-off was disputed at the trial on the alleged ground that the goods were not according to order.

proved that, at the time of the arrest, the plaintiff was indebted to him in the sum of 17*l.*, the price of three marble chimney pieces which he had sold to the plaintiff. A verdict having been found for the plaintiff for 10*l.*—

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Mr. Serjeant *Talfoord* obtained a rule calling on the defendant to shew cause why it should not be referred to the Prothonotary to tax the defendant his costs under the 43 Geo. 3, c. 46, s. 3, on the ground that he had been held to bail without reasonable or probable cause.

Mr. Serjeant *Andrews* shewed cause, upon an affidavit which stated that the plaintiff had before the arrest made several fruitless applications to the defendant for a statement of the account between them; that he had agreed to give the defendant 12*l.* for the chimney pieces, on condition of their being delivered complete and fit for erecting, which the defendant failed to prove at the trial; and that the plaintiff was not aware, at the time he made the affidavit to hold the defendant to bail, that the amount charged for the chimney pieces had not been included in a former settled account, which he had mislaid.—The learned Serjeant submitted that there was nothing to warrant the inference that the arrest was either malicious or vexatious, or made without probable cause; the set-off claimed by the defendant being disputed at the trial—a circumstance which, he contended, distinguished the present case from *Dronefield v. Archer* (*a*) and *Austin v. Debnam* (*b*).

Mr. Justice PARK.—The question is, whether the plaintiff has arrested the defendant and held him to special bail without reasonable and probable cause. Where the

(a) 5 Barn. & Ald. 513, 1 Dowl. & Ryl. 67.
(b) 3 Barn. & Cress. 139, 4 Dowl. & Ryl. 653.

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difference between the sum for which the party is arrested and that which the plaintiff ultimately is found entitled to, is small, the Court will not in general interfere. Here, however, the sum recovered by the plaintiff is less than he was by law entitled to hold the defendant to bail for; and his demand was reduced by a set-off of which he must have been aware at the time he sued out the writ. He should have ascertained the balance before he proceeded to arrest the defendant. Besides, in his affidavit in answer to this application, the plaintiff does not suggest that the articles sold to him by the defendant were not complete: he merely states that the defendant at the trial failed to prove them to be so. If the chimney pieces were not made according to order, the plaintiff should have returned hem.

Mr. Justice GASELEE, Mr. Justice BOSANQUET, and Mr. Justice ALDERSON concurring—

Rule absolute (c).

(c) And see *Ashton v. Nasull*, ante, Vol. 3, p. 184, where it was held, that, where there have been mutual dealings between a plaintiff and defendant, and each has a demand against the other, and the former arrests the latter for the whole amount of one side of

the account, with full knowledge of at least a part of the defendant's demand against him, although the defendant has neglected or refused to deliver his account, the plaintiff is liable to costs under the 43 Geo. 3, c. 46, s. 3.

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NORRIS v. DANIELL.

THIS was an action on the case for an alleged injury to the plaintiff's house by the erection of a mound of earth and rubbish on the defendant's land, and for the diversion &c. of a watercourse.

The first count of the declaration stated that the plaintiff was lawfully possessed of a close and of a messuage and dwelling-house then erected and being thereon, and which said messuage, dwelling-house, and close the plaintiff with his family occupied and inhabited; that the defendant was possessed of a certain other close adjoining to and above the said close of the plaintiff, on a certain declivity: yet the defendant, well knowing the premises, but contriving &c. to injure the plaintiff, and to disturb him in the possession, occupation, and enjoyment of the said messuage, dwelling-house, and close, and to damage and destroy the same, whilst the plaintiff with his family so occupied and inhabited the said messuage and close, to wit, on &c., at &c., wrongfully and injuriously put, placed, heaped, and piled up, and caused to be put, placed, heaped and piled up, divers large, massive, and heavy stones and rocks, and divers large quantities of earth, soil, rubbish and materials, in and upon the close of the defendant so situate upon the said declivity above and adjoining to the said close of the plaintiff, and with the said stones, &c., raised, made, and erected, and caused to be raised &c. a certain high, great, and heavy mound upon the said close of the defendant, and thereby and therewith rendered the said messuage or dwelling-house of the plaintiff so dangerous that he could not nor could his family safely dwell therein: and also by means of the weight and pressure of the said mound, divers large quantities of the earth and soil of the close of the plaintiff had given way and sunk and fallen to a great depth, and been precipi-

c c 2

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A cause (the declaration in which contained eight counts) and all matters in difference between the plaintiff and defendant were referred; the costs of the cause, and of the reference and award relating thereto, to abide the event. The arbitrators found that the plaintiff had good cause of action in respect of the matters charged in five of the counts, and awarded 5*l.* damages, and directed that no further proceedings should be had in the cause; but made no specific award as to the three remaining counts:—Held, that the award was not final, there being no determination as to the three last-mentioned counts, and consequently no legal event as to them to authorize the taxation of costs thereon.

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tated and forced down the said declivity, and other the earth and soil of the close of the plaintiff whereon his dwelling-house was erected and built had greatly shrunk, cracked, and given way, and the foundation of the house had also sunk, settled, and given way, and thereby the said dwelling-house was and is rendered still more dangerous and unfit for habitation, and became and was and is greatly diminished in value and of very little use to the plaintiff; and also by reason of the several premises, the plaintiff was forced and obliged to and did remove himself, his family, goods, and furniture from and out of the said dwelling-house for his and their safety and preservation. The second count alleged that the defendant wrongfully, improperly, carelessly, and negligently dug into the earth and soil near to the said mound, and thereby caused the same to give way and fall, and the same did fall into, upon, and over the said close of the plaintiff, and thereby greatly injured, damaged, and incumbered the same, and hindered and prevented the plaintiff from having the use, benefit, and enjoyment thereof in so ample and beneficial a manner as he ought to and otherwise would have done. The third, fourth, fifth, sixth, and seventh counts were for diverting and muddyng a watercourse which used to supply the plaintiff's house with water for domestic purposes, and for injuring the plaintiff's close and house by the falling of the materials of which the mound in question was composed. The eighth count was trover for taking certain bushes, underwood, earth, and stones belonging to the plaintiff, and converting thereof to the defendant's own use.

The defendant pleaded the general issue.

The cause and all matters in difference between the parties were, by an order of Lord Chief Justice Tindal, afterwards made a rule of Court, referred to the determination of two attorneys; the costs of the action, and of the reference and of the award with reference to the subject

matter of the action, to abide the event of the award; and the costs of the reference of all other matters, and of the award relating thereto, to be in the discretion of the arbitrators.

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On the 1st of August, 1833, the arbitrators made their award, by which they awarded and determined that the plaintiff had good cause of action against the defendant as stated in the third, fourth, fifth, sixth, and seventh counts of the declaration in the said action so referred to them: and they further ordered and determined that the defendant should pay to the plaintiff on the 10th October next ensuing the sum of 5*l.* for his damages in the action; and that no further proceedings should be had in the said action. The arbitrators then awarded, that, upon payment by the defendant to the plaintiff at the time aforesaid of the further sum of 50*l.*, the plaintiff should execute a conveyance to the defendant of a certain part of the plaintiff's close adjoining the defendant's dwelling-house; that, within two months next after such conveyance should be made and executed, the defendant should at his own costs erect and set up a stone wall of a specified height and thickness as a fence on all sides of the piece of land so conveyed which should be contiguous to and adjoining any land or property then belonging to the plaintiff; and that, in case the defendant should omit or fail to make payment of the said sum of 50*l.* at the time aforesaid, the plaintiff should be absolved from making such conveyance, and then that the defendant should, by or before the 24th June, 1834, at his own costs, in a workmanlike manner effectually remove such part of the buttress or mound as then stood upon the part of the piece of land so to be conveyed by the plaintiff to the defendant, and should, before the 1st of August, 1834, at his own costs, restore it to a fit state for cultivation as pasture, and also should, at the defendant's own costs, around such part of the remainder of the mound as should be contiguous to and adjoin

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any land belonging to the plaintiff, on the land of the defendant, erect a stone wall so as to prevent the mound from falling or otherwise damaging the land of the plaintiff. The arbitrators then awarded, that, in case the defendant should omit or neglect to remove the part of the mound on the plaintiff's land, it should be lawful for the plaintiff to do so at the defendant's expense, and to deposit the same on the defendant's land. The award contained several other stipulations with regard to acts to be performed by the defendant, which it is not necessary to enumerate.

Mr. Serjeant *Wilde* in the last term obtained a rule nisi for setting aside the award, on the following grounds:—First, that, by the execution of a conveyance of the property referred to, the plaintiff had withdrawn from the jurisdiction of the arbitrators one of the matters in difference, and thereby revoked the submission.—Secondly, that the award was not final; that no award had been made respecting the first, second, and eighth counts of the declaration; that the award directed the plaintiff, in certain events, to do acts which he could not legally perform; that the award was not final in respect of the directions given relating to the payment of the expenses of removing the works directed to be done by the plaintiff in certain events; nor in respect of the continuance of the mound, the directions given for its removal making it necessary to do acts which neither the plaintiff nor defendant could legally do, and the award not settling the dispute between the parties in the event of its continuance.

Mr. Serjeant *Coleridge* and Mr. Serjeant *Talfoord* now shewed cause.—The arbitrators having found that the plaintiff had good cause of action against the defendant on five of the counts of the declaration, and also directed that the defendant should pay the plaintiff 5*l.* for his da-

mages, and that no further proceedings should be had in the action, they have in substance disposed of the whole of the record; for, the direction that no further proceedings should be had in the action amounts to an award of a *stet processus*, which it was competent to them to order. In *Blanchard v. Lilly* (*a*), an award that each party should pay his own costs, and that certain actions should be discontinued, was held to be final and good, it being in effect an award of a *stet processus*. Here, the award is upon the whole final, and sufficiently certain to enable the parties to perform it. [Mr. Justice *Gaselee*.—If the arbitrators had directed the land to be restored to a fit state for cultivation as pasture, to the satisfaction of a third person, or if they had ordered arable land to be converted into pasture, the award might have been sufficiently certain: but, here, who is to judge what shall be a fit state for cultivation as pasture? It seems to me that this is a contingency which may afford ground for another action between the parties, and consequently that the award is not final.]

Mr. Serjeant *Wilde* and Mr. Serjeant *Mercwether*, in support of the rule.—The award is bad; for, as by the order of reference the cause and all matters in difference between the parties were referred, if the arbitrators have not awarded upon *all* the matters submitted to them, or have insufficiently awarded upon any of them, the whole award is bad—*Randall v. Randall* (*b*). Here, the arbitrators have merely awarded that the plaintiff had good cause of action against the defendant upon the third, fourth, fifth, sixth, and seventh counts of the declaration: but they have made no award as to the causes of action alleged in the first, second, and eighth counts. It must be taken, therefore, that the plaintiff had no cause of action on those counts. But the arbitrators should have so

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stated in their award. By the order of reference, the costs of the cause, and of the reference thereof, and of the award with reference to the subject matter of the action, were to abide the event. No award being made in favour of the defendant upon those counts in respect of which the plaintiff had no cause of action, the defendant is deprived of the advantage that the 74th rule of Hilary Term, 2 Will. 4(c) would have given him, in the allowance to him on taxation of the costs of those counts. The arbitrators had no power to order that no further proceedings should be had in the action. The award would afford no answer to a new action for the erection of the mound: it therefore is clearly not final. In *Blanchard v. Lilly*, the cause was not referred, and the arbitrator had a discretion as to the costs. [The learned Serjeants were proceeding to argue on the insufficiency of the award in other respects; but they were stopped by the Court.]

Mr. Justice PARK.—I am of opinion that this objection to the award is well founded, and cannot be got over. It is therefore unnecessary to enter into any discussion upon the other objections that have been suggested. Where a cause and all matters in difference are referred to an arbitrator, and the costs are directed to abide the event, he must decide on the whole cause; otherwise there is as to part no such legal event as will authorize the taxation of the costs. Here, as the arbitrators have not decided on three of the counts, or in any manner noticed them in the award, the Prothonotary cannot on taxation allow the defendant his costs of those counts; though there might have been no cause of action against the defendant in re-

(c) *Ante*, Vol. 1, p. 425. "No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not suc- ceeded; and the costs of all is- sues found for the defendant shall be deducted from the plaintiff's costs."

spect of the matters charged in those counts. The rule that has been obtained by the defendant for setting aside the award must therefore be made absolute.

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Mr. Justice GASELEE Mr. Justice BOSANQUET and Mr. Justice ALDERSON concurring—

Rule absolute.

ELLIOTT v. PYBUS.

*Monday,
April 28th.*

THIS was an action of assumpait. The declaration contained counts for goods bargained and sold and for work and labour, the common money counts, and a count upon an account stated. Plea, the general issue. The cause was tried before Mr. Serjeant Arabin, in the Sheriff's Court in London, on the 4th instant, when the following facts were given in evidence on the part of the plaintiff:—The plaintiff was an engineer; the defendant an engraver. In the month of August, 1833, the defendant employed the plaintiff to make for him certain parts of an engineer's ruling machine, according to a plan of his own, paying a deposit of 4*l.* on account. The machine was made pursuant to the order, and inspected from time to time by the defendant, and a further sum of 2*l.* was paid by him. When the machine was completed to the defendant's satisfaction, the plaintiff sent the defendant a bill amounting to 16*l.* 19*s.* 8*d.*, and requested the defendant to fetch the machine away and pay the balance. The defendant at first objected to the charge; but he afterwards called at the plaintiff's shop, when he admitted that the machine was made according to his order, and requested the plaintiff to

The plaintiff was employed by the defendant to make a machine for him according to a particular plan, receiving a payment on account, but no specific price being agreed on. When the machine was completed, the defendant saw and approved of it, but objected to the price demanded for it. The defendant afterwards requested the plaintiff to send it home before it was paid for; which the latter refused to do. On being applied to for the amount by the plaintiff's attorney, the defendant said he would endeavour to arrange it if the plaintiff

would give him time:—Held, a sufficient appropriation of the machine by the plaintiff, and assent thereto on the part of the defendant, to entitle the former to recover the value on a count for goods bargained and sold.

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send it home before he paid for it. This the plaintiff refused to do, it being, according to the evidence, the custom for engineers to obtain payment before the delivery of the article. On an application made by the plaintiff's attorney for payment of the balance, the defendant refused to pay the amount, on the ground that the charge was exorbitant: but he shortly afterwards returned, and said that he would endeavour to arrange it if the plaintiff would give him time.

The defendant's counsel declined to call any evidence or to address the jury—submitting that the plaintiff ought to be nonsuited on the ground that there was no sale and no acceptance of the machine by the defendant, and no property in it passing to the defendant, so as to entitle the plaintiff to maintain the count for goods bargained and sold; and that the plaintiff should have declared specially against the defendant for not accepting and paying for it. He cited *Mucklow v. Mangles* (*a*) and *Atkinson v. Bell* (*b*).

The learned Serjeant thought that the evidence disclosed a sufficient acceptance of the machine by the defendant to sustain the count for goods bargained and sold; and, the defendant's counsel still declining to go to the jury, a verdict was entered for the plaintiff for the sum claimed, with a reservation of leave to the defendant to move to enter a nonsuit in the event of the Court being of opinion that the ruling of the learned Serjeant was erroneous.

Mr. Serjeant *Wilde* accordingly obtained a rule nisi.

Mr. Serjeant *Talfoord* now shewed cause—*Mucklow v. Mangles* and *Atkinson v. Bell* are clearly distinguishable from the present case, inasmuch as in the former there was no complete bargain and sale, no agreement as to price,

(*a*) 1 *Taunt.* 318. (*b*) 8 *Barn. & Cress.* 277, 2 *Man. & Ry.* 292.

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and in the latter there was no specific appropriation of the goods assented to by the buyer; whereas here the defendant, after the machine was completed, expressed his satisfaction with it, and, though he at first objected to the price demanded for it, yet he afterwards agreed to pay it, but asked time. But the case falls expressly within *Woods v. Russell* (c). There A. contracted with B. to build a ship and furnish her with every requisite for sea, the price to be paid by four instalments, two to be paid in the progress of the work, and the others when the vessel was finished and launched. The first two instalments were paid at the respective times stipulated. When the hull was ready for launching, the ship was measured and surveyed with the privity of the builder; and the master who had been previously appointed entered into the usual bond for the delivery of the register to the Custom-House. The ship was then registered in the name of the purchaser, and all the requisites of the register acts were complied with. The builder then received the third instalment. Before the ship was launched the purchaser advertised for freight, chartered her for a voyage, and hired a crew, with the privity of the builder. The ship was not in fact launched, as stated in the register, but remained in the builder's yard, and his men were at work upon her until the 3rd of July. From the early part of June till the 30th, an apprentice of the master was employed in the ship, and on the 1st of July his bedding was put on board. On the 30th of June the builder committed an act of bankruptcy, and on the 8th of July a commission issued against him. On the 2nd of July the purchaser took possession of the vessel whilst she remained on the builder's wharf, and took away a rudder and cordage; and on the 4th she was launched, and afterwards equipped for sea, at the purchaser's expense, the fourth instalment remaining

(c) 1 Dowl. & Ryl. 587, 5 Barn. & Ald. 942.

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unpaid. It was held, that, as between the bankrupt and the purchaser, there was such a transfer to and general ownership in the latter as to exclude the operation of the 21 Jac. 1, c. 19, s. 11, and bar an action of trover at the suit of the assignees; but that the assignees were entitled to such portion of the fourth instalment as would remain due after satisfying the expenses of completing the vessel for sea according to the contract, and for which the bankrupt would have had a lien upon the vessel. In *Rohde v. Thwaites* (*d*), A. agreed by parol to sell twenty hogsheads of sugar out of a larger quantity which he had in bulk. A. filled four hogsheads, and delivered them to B., who accepted them. A. afterwards filled sixteen other hogsheads, and requested B. to fetch them away, which he promised to do. It was held that the property in the sixteen hogsheads thereby passed to B.; that his acceptance of the four was an acceptance of part of the twenty, within the exception in the 29 Car. 2, c. 3, s. 17; and that A. might recover the value of the whole from B. in an action for goods bargained and sold. Mr. Justice Bayley there said (*e*): "Where a man sells part of a large quantity of goods, and the option is in him to select the part from the whole, he cannot, until he has made that selection, maintain an action for goods bargained and sold. But, as soon as he selects part and appropriates it for the benefit of the vendee, the property in the part so selected and appropriated passes to the vendee, although the vendor is not bound to part with the possession until the price is paid. Now, it appears that the plaintiffs did in point of fact appropriate sixteen hogsheads for the benefit of the defendant; that they communicated to the defendant that they had so appropriated them, and requested him to fetch them away; and that he adopted that act of the plaintiffs,

(*d*) 9 Dowl. & Ryl. 293, 6 Barn. & Cress. 388.

(*e*) 9 Dowl. & Ryl. 296, 7.

and said that he would fetch them away as soon as he could. I am of opinion that by means of that appropriation so made by the plaintiffs and assented to by the defendant, the property in the sixteen hogsheads of sugar passed to the vendee; and, that being so, the plaintiffs are entitled to recover the full value of the twenty hogsheads of sugar under the count for goods bargained and sold." In *Simmons v. Swift* (*f*), Mr. Justice Bayley says: "Generally speaking, where there is a bargain made for the purchase of goods, and nothing is said at the time about the delivery or the time of payment, the property in them vests immediately, so as to subject the buyer to all future risks, *provided nothing remains to be done on the part of the seller*, although in that case the buyer will not be entitled to take away the goods without payment of the price; but, if nothing remains to be done on the part of the seller to complete the contract, and nothing is said as to the time of payment or delivery, and in the mean time an accident happens before they are taken away, the buyer must take the consequences;" and Mr. Justice Hollroyd says: "In the case of a sale of specific goods and chattels, where the quantity is ascertained or designated, it may be taken as a general position, that the property is altered by the sale, notwithstanding the vendor is not bound to deliver until the price is paid, except where there is a stipulation for credit or payment at a future time, which would be inconsistent with the doctrine of lien." In the present case, there was a specific appropriation of the machine by the plaintiff, assented to by the defendant, and the only demur was as to the price. The appropriation and assent so far altered the property in the machine that the defendant might have brought trover for it; or, if it had been destroyed by fire, the defendant must

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(f) 8 Dow. & Ryl. 693, 5 Barn. & Cress. 857, nom. *Simmons v. Smith*.

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have borne the loss (*g*); and therefore the plaintiff is entitled to recover the value under the count for goods bargained and sold. Besides, there was sufficient evidence to entitle him to recover upon the account stated. The statute of frauds is out of the question, by reason of the part payments.

Mr. Serjeant *Wilde*, in support of his rule.—*Woods v. Russell* is distinguishable from the present. There payments were made from time to time, not generally on account as here, but for specific parts of the vessel as completed. And in *Rohde v. Thwaistes* there was a separation of certain hogsheads of the sugar from the bulk expressly for the vendee, *and with his assent*. Here, although the machine was completed, there was no such appropriation by the plaintiff and assent by the defendant as would pass the property to the latter, so as to render him liable to bear the loss in case of its accidental destruction, or to entitle him to sue for it in trover if the plaintiff had parted with it to another person or refused to deliver it on demand and tender of the price. In *Mucklow v. Mangles*, it was held, that, if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished *and de-*

(*g*) See *Tarling v. Baxter*, 9 Dow. & Ryl. 272, 6 Barn. & Cress. 360. There, the defendant agreed to sell to the plaintiff a stack of hay for 145*l.*, to be paid for in one month, and to be allowed to stand on the defendant's premises for three months; the plaintiff stipulating that the hay should not be cut till paid for. The hay was ac-

cidentally burned on the defendant's premises:—Held, that there was a contract for an immediate sale, by which the property in the hay vested immediately in the plaintiff, and that he, having paid for the hay, could not recover back the price from the defendant.

livered to him. Mr. Justice Heath there said : " A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. If the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made." In *Atkinson v. Bell*, the patentee of certain spinning machinery, having received an order from the defendant to procure some spinning machines to be made for him, employed the plaintiff to make them for the defendant, and informed the latter that he had done so; after the machines had been completed, the patentee suggested certain alterations, which were made, and communicated to the defendant, who offered no objection: the machines were afterwards completed according to the new order, and packed up in boxes for the defendant, who was informed that they were ready for delivery; but he refused to accept them: and, notwithstanding this express appropriation and assent on the part of the agent of the buyer, it was held that an action for goods bargained and sold would not lie. [Mr. Justice Alderson referred to *Tempest v. Fitzgerald*(*h*).] In *Simmons v. Swift*, a contract of sale was entered into in these terms—" I have thisday sold the bark stacked at R., at 9*l. 5s.* per ton of twenty-one hundred weight, to H. S., which he agrees to take, and pay for it on the 30th of November." Part of the bark was in a few days afterwards weighed and delivered to the vendee, who refused to take away the remainder: and it was held that the property in the residue did not vest in the vendee until the weight had been ascertained, and consequently that neither an action for goods sold and de-

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livered, nor for goods bargained and sold, would lie against the vendee for the amount. Mr. Justice Littledale said (i): "In this case there was an actual delivery of part of the goods, but the vendee's right to the possession of the remaining part could not have vested until the weight of the bark had been ascertained, and the price paid. I had, however, thought that the property did pass for some purposes, though not for the purpose of maintaining an action for goods bargained and sold. The mere bargain would not be sufficient, *because no specific price had been fixed and ascertained*; nor could the plaintiff for the same reason recover upon a quantum valebat." So, here, there having been no delivery, and no price fixed and ascertained (for, the expression imputed to the defendant, that he would endeavour to *arrange* it, is at best very equivocal), the property in the machine did not so vest in the defendant as to entitle the plaintiff to maintain this action in its present form.

Lord Chief Justice TINDAL.—It appears that the parties to this cause mutually assented at the trial to consider the learned Serjeant who presided as standing in the place of the jury—the defendant's counsel declining to address them. The learned Serjeant was of opinion that there had been a sufficient acceptance of the machine by the defendant to entitle the plaintiff to recover the price on the count for goods bargained and sold; and the question is whether that opinion is consistent with the principle established by the decided cases. It appears to me that we shall be doing no violence to any of those cases by holding that the opinion of the learned Serjeant was correct, and that the verdict may therefore be sustained. The principle is, that an action for goods bargained and sold cannot

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be maintained unless the property in them has passed from the vendor to the purchaser. The question then is, whether from the evidence given at the trial we can discover that there has been any agreement between the parties as to the price to be paid by the defendant for the machine previously to the commencement of the action. If no deposit or part payment had been made by the defendant, there might have been ground for argument as to whether or not there had been an acceptance of the article within the 17th section of the statute of frauds: but it seems that two payments, viz. of 4*l.* and 2*l.*, were made by the defendant during the progress of the work. Is then the case distinguishable from *Mucklow v. Mangles* and *Atkinson v. Bell* in respect of any such agreement as to price as will amount to an acceptance of the article by the purchaser? In *Mucklow v. Mangles* there was no specific agreement as to price; and, in *Atkinson v. Bell*, there was no acceptance of the goods by the vendee, but on the contrary an express refusal to accept them. In the present case, though the defendant at first refused to accept the machine on the ground that the price demanded for it by the plaintiff was supposed to be exorbitant, yet it appears that he ultimately came to the plaintiff's terms. It was proved that the defendant called at the plaintiff's shop after the machine was finished, and, admitting that it had been made according to his order, promised to pay for it if the plaintiff would send it home. The plaintiff however declined to send it without first being paid for it. Subsequently, the plaintiff's attorney wrote to the defendant demanding the amount due for the machine, when the defendant called upon the attorney, and said that he would endeavour to arrange it if the defendant would give him time. The defendant therefore has assented to the price charged. Still, the question undoubtedly is whether or not the property in the machine has passed from the plaintiff to the defendant: and the true test is, whether or not

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the latter was in a situation to maintain trover for it (*k*); for otherwise the plaintiff cannot support this action. I am clearly of opinion that the property did vest in the defendant from the moment he assented to pay the price charged. In *Tempest v. Fitzgerald*, the defendant agreed to purchase a horse of the plaintiff for ready money, and to fetch him away on a given day; two days before which time the defendant rode the horse and gave directions as to his exercise and future treatment, &c., but requested that he might remain in the plaintiff's possession for a further time, at the expiration of which he promised to fetch him away and pay the price; to which the plaintiff assented: the horse dying before the defendant paid the price or took him away—it was held that there was no acceptance so as to make the bargain executed within the meaning of the statute; and that it was properly left to the jury to say whether the riding of the horse was by way of trial only, or whether the defendant was then exercising an act of ownership; and whether the directions then given by him were given by way of advice or as owner: and that, if they thought he was exercising acts of ownership, they were to find for the plaintiff; if otherwise, for the defendant. The jury having found for the plaintiff, the verdict was set aside, on the ground that the bargain was for ready money, and the defendant's acts being unaccompanied with payment, the property did not pass. Taking therefore the whole evidence in this case together, it appears to me that the property in the machine passed to the defendant from the moment at which he assented to pay the price charged for it by the plaintiff.

(*k*) The purchaser of goods cannot maintain trover for them without paying the price; for, though he acquires the right of property by the purchase, he can only acquire the right of possession by

the payment: and, in order to maintain trover, he must have both the right of property and the right of possession. *Bloxam v. Saunders*, 7 Dow. & Ryl. 396, 4 Barn. & Cress. 491.

Mr. Justice PARK.—It is admitted that no question arises in this case upon the statute of frauds: and the single point is whether this action for goods bargained and sold can under the circumstances proved at the trial be maintained. Many of the cases that have been determined upon this subject have turned on very refined and subtle distinctions. In *Atkinson v. Bell*, however, it was distinctly held, that, to support an action for goods bargained and sold, there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation of goods afterwards, assented to by the buyer. My Lord Chief Justice has gone so fully into the case that I need only say that I entirely concur with him. If the question had gone to the jury, I think they would not under the circumstances have been warranted in saying other than that, as the defendant had approved of the machine after it was completed, and agreed to arrange for the payment of the price charged if time were given him for that purpose, there was such an appropriation, and assent thereto on the part of the defendant, as passed the property in it to him.

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Mr. Justice GASELEE.—It was agreed at the trial that the question should be withdrawn from the jury. If it had gone to them, and they had found that there had been an acceptance by the defendant, I think their verdict would have been unquestionable. There is perhaps another reason why we ought not to grant a new trial in this case, viz. that the amount in question is under 20*l.*(*l*). But it is not necessary now to discuss that point, the only question before us being one of fact—whether or not there has been such an appropriation by the plaintiff and acceptance by the defendant as to pass the property in the machine to the latter; which question I think was properly decided

(*l*) See *Henning v. Samuel*, ante, Vol. 3, p. 818.

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in the affirmative by the learned Serjeant who presided at the trial.

Mr. Justice ALDERSON.—I am of the same opinion. The learned Serjeant before whom the cause was tried stated his opinion, from the evidence adduced before him, to be, that there was a sufficient acceptance of the article to entitle the plaintiff to sustain the count for goods bargained and sold. If the question had been left to the jury with such observations as the learned Serjeant might therefore have been expected to make to them, they would in all probability (and I think they would have been fully justified in so doing) have found that the defendant had assented to accept the machine.

Rule discharged.



*Wednesday,
April 30th.*

An action will not lie at the suit of one of three co-parceners to recover his proportion of rents of the estate received by an agent: and, the agent claiming the rents under a devise to himself—seemly, that money had and received was not the proper form of action in which to raise the question.

DECHARMS v. HORWOOD.

THIS was an action of assumpsit for money had and received by the plaintiff to the defendant's use. Plea, the general issue. At the trial before Mr. Justice Alderson at the Sittings in London in the last Trinity Term, a verdict was found for the plaintiff for 23*l*. 14*s.* 10*d.*, subject to the opinion of the Court upon the following case:—

For many years previous to and at the time of his death, the Rev. Thomas Russell, clerk, was seised in fee-simple (amongst other hereditaments) of a certain estate called Russell's Rents, situate in the parish of St. Mary Abbots, Kensington, consisting of several houses let to and occupied by various tenants, many of whom were weekly tenants, at sums of from 3*s.* to 4*s.* 6*d.* per week. The defendant, in the life-time of Thomas Russell, acted as his agent in collecting and receiving the rents as they became due from the tenants of the said estate, and had collected and received the same from the year 1811.

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Thomas Russell died on the 7th of May, 1831, leaving as his heirs, the plaintiff, who was the elder son of a deceased second cousin of the said Thomas Russell, viz. Sarah Decharms (formerly Sarah Meade); Edith, the wife of John Coggan (formerly Edith Meade); and Anne, the wife of William Boulton (formerly Anne Meade); who were all sisters, and were second cousins of the said Thomas Russell, *ex parte paternâ*. After the death of Thomas Russell, and previously to the commencement of this action, the tenants of Russell's Rents attorned to his heirs, who, at the time the action was commenced, were in receipt of the rents and profits thereof. The defendant continued for some time to collect the rents of the estate; and, previously to such attornment, for rents which had become due subsequently to the death of Thomas Russell, he received the sum of 71*l.* 4*s.* 8*d.*, for one-third part whereof, as the plaintiff's share, this action was brought. The defendant claimed the rents in question under a devise in Thomas Russell's will; but the plaintiff alleged that this devise was cancelled; and upon that head the Court were to look at the will, and draw such conclusion as a jury would have done.

The questions for the opinion of the Court were—whether there was any sufficient and valid devise of the said estate called Russell's Rents, to defeat the right of the heir at law to the rents received by the defendant after the death of Thomas Russell: if the Court should be of opinion there was not, then—whether the sum for which the verdict was found could be recovered in an action for money had and received: if it might be so recovered, then, whether by the above-named plaintiff alone.

The case now came on for argument.

Mr. Serjeant Spankie, for the plaintiff (*a*).—The Courts

(*a*) The Court gave no judgment on the first question, and therefore the argument on that part of the case is omitted.

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will not in general try the title to land in an action of this description. But in *Marshall v. Hopkins* (*b*), the value being small, the Court of King's Bench did determine a question of title in an action for money had and received. And in *Newsome v. Graham* (*c*), where rent was paid by A. to B., claiming as devisee, and A. was afterwards compelled to pay the amount to the heir, it was held that it might be recovered back by A. as money had and received to his use, B. setting up no title to the lands when the action was brought or at the trial. Lord Tenterden, delivering the judgment of the Court, said: "We are all clearly of opinion that the action for money had and received is maintainable under the circumstances of this case. They are these:—The plaintiff had from time to time paid rent to the defendants for certain premises which he held of them. It turned out at length that the defendants had no title to those premises. The plaintiff was ejected, and compelled to pay the mesne profits for the time during which he had held of the defendants. And this action was brought to recover back the rent which he had paid to them. The objection was, that title to land could not be tried in an action for money had and received. That is true; but there was no trial of title in this case. It had been previously ascertained that the defendants had no title whatever to the premises; and the defendants did not, at the trial of this cause, claim to have any title." So, here, the defendant claims no interest in the land; the rents received by him have ceased to be part of the realty, and have become part of the personality.

It is objected that an action is not maintainable by one of several co-parceners, inasmuch as they all constitute but one heir. In many respects, however, their rights are distinct: like tenants in common, they have several

(*b*) 15 East, 309.

(*c*) 5 Man. & Ryl. 64, 10 Barn. & Cress. 234.

freeholds—Co. Litt. 241.—Bacon's Abridgment, title “Co-parceners.” “ If three co-parceners recover land and damages in an assize of mort d'ancestor, albeit the judgment is joint, that they shall recover the land and damages, yet the damages being *accessory*, though they be personal, do in judgment of law depend upon the freehold, being the principal, which is several; and though the *words* of the judgment be *joint*, yet shall it be taken for *distributive*; and therefore if two of them die, the entire damages do not survive, but the third shall have the *execution according to her portion* (*d*).” “ In ejectment brought upon a lease made by two co-parceners, the declaration was quod demiserunt: exception was taken, that the lease is the several lease of each of them for the moiety: and it was ruled a good exception (*e*).” “ Where two daughters are heirs, and the one enters, and one who has no right ousts her, and she brings assize *in her name alone*, and all this matter found by verdict; and because she hath right against all who hath not right, therefore she recovered by award (*f*).” “ Where two co-parceners are disseised, and the one has issue and dies, there the one shall have action of the one moiety, and the issue of the other shall have writ of entry sur disseisin of the other moiety; and when they have recovered and had execution, they shall be co-parceners as before (*g*).” In *Martin v. Crompe* (*h*) Lord Chief Justice Holt says: “ Tenants in common of a reversion expectant on a lease for years upon which a rent is reserved, may either join in debt for the rent, or sever.” And in *Cutting v. Derby* (*i*), it was held that one tenant in common might bring an action for the double

(*d*) Vin. Abr. tit. “ Parceners,” (“ Parceners ”) (Q), pl. 1.
(S).

(*e*) Mo. 682, pl. 939. Mich. 42 & 43 Eliz., *Milliner v. Robinson* —Vin. Abr. tit. “ Parceners,” (W), pl. 9.

(*f*) Br. “ Entre Cong.” pl. 59, cites 26 Ass. 2 — Vin. Abr. tit.

(*g*) Br. “ Joinder in Action,” pl. 43, cites 39 [quære 37] H. 6, 8.—Vin. Abr. tit. “ Parceners,” (H), pl. 3.

(*h*) 1 Lord Raym. 341.
(*i*) 2 Sir W. Blac. 1077.

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value of his moiety, under the statute 4 Geo. 2, c. 28—on the ground that they have several freeholds. In replevin on a distress by one of two tenants in common, the distrainer avows for his own moiety, and, as to the other, makes cognizance as bailiff of his companion. Quoad the enjoyment of possession, the rights of co-parceners are several: each has a right, in respect of his several freehold interest, to vote in the election of members of parliament. [Lord Chief Justice *Tindal*.—In *Stedman v. Bates* (*k*), it was held that co-parceners must join in an avowry.] In *Harrison v. Barnby* (*l*), it was held that a terre-tenant holding under two tenants in common, paying the whole rent to one, after notice from the other not to pay it, may be distrained on by the other tenant in common for his share. There is therefore no valid objection to co-parceners severing in the assertion of a claim like the present.

Mr. Serjeant *Talfourd*, contra, was stopped by the Court.

Lord Chief Justice *TINDAL*.—I entertain no doubt upon the first question: I think there was no animus cancellandi as to the devise of the rents in question; though, inasmuch as the third objection presents an insurmountable bar to the plaintiff's recovery in this action, it is unnecessary to give any opinion upon either of the others. I take it to be perfectly clear that one of two or more co-parceners cannot maintain an action for money had and received under the circumstances disclosed in this case. Therefore, even if the cancellation in the will did extend to the premises in question, this action must fail. Among co-parceners there is such an unity of interest, of title, and of possession, that all together constitute but one heir (*m*),

(*k*) 1 Lord Raym. 64.

(*l*) 5 Term Rep. 246.

(*m*) Vin. Abr. " Parceners," (F), pl. 2, 4.—" Albeit, where

there are two co-parceners, they have two moieties in the lands descended to them, yet are they both but one heir, and one of them is

though to many purposes in judgment of the law they have several freeholds; in which respect they differ from joint tenants (*n*). In *Stedman v. Bates*, the defendant made cognizance as bailiff of the Countess of Salisbury, and shewed that one John Bennett was seised of the place where &c. in fee, and, being so seised, demised to John Griffith for one hundred and eighty years, rendering rent; that John Bennett died, whereby the reversion descended to the Countess of Salisbury and her sister, Mrs. Bennett; and, as bailiff to the Countess, he made cognizance for rent arrear &c. The plaintiff demurred. Hill, for the defendant, said, that, although the daughters were one heir to the father, yet they had several inheritances, and therefore it was not absolutely necessary for them to join in an avowry, and cited a case in point — *Osmer v. Sheafe* (*o*). But, per Mr. Justice Rokeby—"This point was never argued in that case; and Littleton himself says that co-parceners ought to join in avowry:" and judgment was given for the plaintiff. If therefore co-parceners cannot distrain separately, how can one, where the rent has been received by a party in the character of a trustee, claim separately for his portion by an action. The receiver might thus be burthened with several actions? In the present case there has been no division of the freehold interest of the three co-parceners before the commencement of the action, and no assent by the defendant to hold a specific share of the rents received on account of the plaintiff; and therefore the plaintiff had no authority to bring a se-

not the moiety of an heir, but both of them are but *unus hæres*"—Co. Litt. 163. b. "As they be but one heir and yet several persons, so they have one entire freehold in the land, as long as it remains undivided, in respect of any stranger's præcipe; but between themselves in judgment of law they have to many purposes several

freeholds; for, the one of them may infest the other of them of her part, and make livery"—Co. Litt. 164. a.

(*n*) See Blackstone's *Commentaries*, Vol. 2, pp. 180 to 194, as to the different natures of joint tenancy, co-parcenary, and tenancy in common.

(*o*) *Lutw.* 1210, 3 *Levinsz*, 370.

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parate action.—It is unnecessary to consider the other point, as to the form of the action.

Mr. Justice PARK.—It is unnecessary to decide the first question; though, as the property is small, my Lord Chief Justice has thought it right to give a hint of the impression of the Court, in order to spare future litigation on the subject. I entirely concur with the opinion pronounced by his Lordship upon the second question, viz. that the action is not maintainable by this plaintiff alone: and I also think money had and received is not the proper form of action in which to raise the point.

Mr. Justice GASELEE, and Mr. Justice VAUGHAN concurred: the latter observing that money had and received would not lie to recover money received under the circumstances stated in the case.

Judgment for the defendant (*p*).

(*p*) If a man seised of certain land in fee has issue two daughters, and dies, and the daughters enter &c., and each of them has issue a son, and die without partition made between them, by which the one moiety descends to the son of the one parcener, and the other moiety descends to the son of the other parcener, and they enter and occupy in common, and are disseised; in this case they shall have in their two names *one assize*, and not *two assizes*. And the cause is, for that albeit they come in by divers descents &c., yet they are parceners, and a writ of partition lies between them. And they are not parceners having regard or respect only to the seisin and possession of their mothers,

but they are parceners rather having respect to the estate which descended from their grandfather to their mothers; for, they cannot be parceners if their mothers were not parceners before, &c. And so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a title in parcreny, the which makes them parceners. And also they are but as one heir to their common ancestor, viz. to their grandfather, from whom the land descended to their mothers. And for these causes, before partition between them &c., they shall have an assize, although they come in by several descents. Vin. Abr. "Parceners," (R); pl. 3, in margin.

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ROBERTS v. BROWN.

Monday,
April 21st.

THIS was an action for a libel. The first count of the declaration stated, that, before the time of committing the grievance next hereinafter mentioned, a certain commission was issued, in the nature of a writ de lunatico inquirendo, under the great seal of Great Britain, bearing date at Westminster, the 25th July, 4 Will. 4, and directed to Roger Meeson and John Evans, Esqrs., Richard Williams, Joseph Isaacs, and Edward Jones, Gentlemen, whereby they or any three of them were assigned to inquire, amongst other things, whether one Job Weaver, of Hernioge, in the county of Denbigh, inn-keeper, was a lunatic, or enjoyed lucid intervals, so that he was not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels, and, if so, from what time, after what manner, and how, to wit, in the county of Middlesex:—And whereas, under and by virtue of that commission, afterwards, and before the committing of the grievance next hereinafter mentioned, an inquisition was held and taken at the house of the said Job Weaver, at Hernioge aforesaid, to wit, in the county of Middlesex aforesaid, before the said Roger Meeson, Richard Williams, and Joseph Isaacs, being three of the commissioners named for the purpose aforesaid, upon the oaths of sixteen good and lawful men of the said county; and upon that inquisition the said plaintiff, who then was and still is a surgeon, to wit, in the county of Middlesex aforesaid, was examined upon oath before the said commissioners and the said jury, and then and there gave evidence touching the state of mind of the said Job Weaver, as well on other days and times as on the 22nd day of September, 1832, to wit, in the county of Middlesex aforesaid; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in

The defendant in publishing what professed to be an account of proceedings under a commission of lunacy, on which the plaintiff had been examined as a witness to prove the insanity of the party, made statements reflecting on the testimony of the plaintiff, but without setting out his evidence; and concluded with saying—

“Mr. Jervis made a splendid speech of two hours’ duration in favour of Mr. W.’s sanity, and commented with cutting severity on the testimony of Mr. R. (the plaintiff):”—

Held, that the whole publication taken together was libellous, inasmuch as it insinuated a charge of perjury against the plaintiff; and that a plea justifying the concluding sentence only, was ill on demurrer.

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his good name, fame, and character, and to bring him into public slander, infamy, and disgrace, and to cause it to be suspected and believed that he was guilty of perjury, and subject him to the pains and penalties of the law in respect thereof, and to vex, harass, and ruin him the plaintiff, afterwards, to wit, on the 20th August, 1833, in &c. aforesaid, wrongfully, maliciously, and injuriously composed, wrote, and published, and caused to be composed, written, and published, a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning the evidence so as aforesaid given by the plaintiff touching the state of mind of the said Job Weaver upon the inquisition aforesaid, which said false, scandalous, malicious, and defamatory libel, is as follows, that is to say:—"Commission of Lunacy (meaning the commission aforesaid). The Lord Chancellor having issued a commission to inquire into the sanity of Mr. Job Weaver, the respectable occupier of Hernioge Inn, in the county of Denbigh (meaning the commission aforesaid), the proceedings (meaning the said inquisition) commenced at that place on Monday the 12th instant, and a verdict was returned on Friday evening, that the said Job Weaver is of unsound mind, and unable to conduct his own affairs since the 4th day of May, 1833. It was attempted to be proved by the testimony of Mr. Owen Owen Roberts (meaning the said plaintiff), that, on the 22nd of September last (meaning the 22nd day of September, 1832), Mr. Weaver had visited Carnarvon, and was consulting him (meaning the plaintiff) about a hurt on his leg; that, whilst examining it, Mr. Weaver in a hurried manner said 'Oh, never mind, this is a trifling matter. I have more important concerns to attend to; for, I have a compact with the Almighty that I should attend to the conversion of the Jews in this world, whilst he attends to my interests in the world to come.' On this evidence (meaning the evidence of the plaintiff) it was meant to be inferred that Mr. Weaver was insane at that

time, and on that day: but Mr. Owen Roberts's (meaning the plaintiff's) testimony being unsupported by that of any other person, it failed to have any effect on the jury. Mr. Weaver's religious opinions being enthusiastic, not fanatical. The object of fixing on the 22nd of September was, to set aside a will supposed to be made on that day, and prejudicial to the interests of some of his family; while the fact of his will (a most equitable one) being made in January, 1832, was proved; which will, devising the interest of money in the funds after his death to his wife for her life, and appointing his daughters Mrs. William Denman, of the Goat Hotel, Carnarvon, and Mrs. John Jones, his residuary legatees, has been fully established; (thereby insinuating and intending to have it believed that the plaintiff had knowingly and wilfully given false testimony as to what was stated to have occurred on the said 22nd September, with a corrupt purpose of setting aside a supposed will of the said Job Weaver). The sum of money in the funds is small, the other property considerable. The jury was composed of gentlemen from Ruthin and its neighbourhood, from whence Mr. Weaver, comes. The testimony of five most respectable medical gentlemen went to prove Mr. Weaver capable of managing his pecuniary affairs. The jury found otherwise. We do not quarrel with or question the verdict, more especially as it secures the reversion of Mr. Weaver's property to those who have the most undoubted claim to it. Mr. Jervis made a splendid speech of two hours' duration in favour of Mr. Weaver's sanity, and commented with cutting severity on the testimony of Mr. Owen Owen Roberts (meaning the said evidence of the said plaintiff). The persons at present conducting the business of the house at Hernioge will have to account for all monies received from the 4th of May, and the management of Mr. Weaver's affairs will be given to persons appointed by the Court of Chancery."

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The defendant, in his third plea, as to the composing, writing, and publishing, and causing to be composed, written, and published, so much of the said supposed libellous matter in the first count mentioned as is contained and conveyed in the following part of the said supposed libel, in that count mentioned, to wit, "Mr. Jervis made a splendid speech of two hours' duration in favor of Mr. Weaver's sanity, and commented with cutting severity on the testimony of Mr. Owen Owen Roberts (meaning the said evidence of the said plaintiff)"—said, that, before and at the said time when &c., to wit, upon the holding and taking of the inquisition in the first count mentioned, the said Mr. Jervis in the said supposed libel and first count mentioned was retained as counsel; and that the said Mr. Jervis did then and there, upon the holding and taking of the said inquisition, after the said examination of the said plaintiff in the first count mentioned, and before the said time when &c., speak as counsel as aforesaid at great length in favor of the sanity of the said Job Weaver; and did in the course of such his speech, before the said time when &c., comment with cutting severity upon the said evidence of the plaintiff: wherefore the defendant, at the said time when &c., did compose, write, and publish, and caused to be composed, written, and published, so much of the said supposed libellous matter in the first count mentioned as is contained or conveyed in the said part of the said supposed libel in the introductory part of this plea mentioned and set forth, as he lawfully might. And this &c., wherefore &c.

To this plea there was a general demurrer and joinder.

Mr. Serjeant *Wilde*, in support of the demurrer.—The plea is bad, inasmuch as it does not justify the sting of the libel: the part which is not justified is the most important part; and the whole taken together is clearly libellous. In order to a perfect justification in a case of this sort, the

report must be a fair and substantially correct report of what took place on the inquiry: whereas here, the writer has indulged in unnecessary reflections upon the witness—insinuating that the jury did not give credit to his testimony. The libel professes to give a mere summary of the proceedings, without setting out the evidence. It imputes to the plaintiff an attempt to destroy by perjury the effect of a will. In *Stiles v. Nokes* (*a*), it was held to be no justification to a libel containing an insinuation of perjury against the plaintiff (who had sworn to an assault by A. B. upon him), that it did appear (which was the suggestion in the libel), "from the testimony of every person in the room except the plaintiff," that no violence had been used by A. B. &c.; for, non constat thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter is so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to "such parts of the supposed libel as purport to contain an account of the trial &c.," and that the said parts contain a just and faithful account of the trial &c. In *Lewis v. Waller* (*b*), the declaration, in stating a libel which purported to be a speech of counsel at a trial of the plaintiff on an indictment for a conspiracy, after setting out the speech of the counsel for the prosecution, which in part contained the libel, proceeded to state that the first witness who was called proved all that had been stated by such counsel, and that the defendant was acquitted, such witness not being able to prove a mere matter of form: a plea that such a speech was made at the trial, and that the witness called proved all that had been so stated, but not setting out the evidence or justifying the truth of the charges made in the counsel's speech—

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(*a*) 7 East, 493. And see *Carr v. Jones*, 3 Smith, 491.

(*b*) 4 Barn. & Ald. 605.

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was held bad, on the ground that a party cannot be justified in publishing the result of evidence given in a Court of justice, but the evidence itself must be stated. So, in *Flint v. Pike* (c), a plea to an action for a libel purporting to be the report of a trial, "that the alleged libel was in substance a true report of the trial, was held bad on demurrer. And in *Saunders v. Mills* (d), it was held, that, in order to justify the publication of a report of a cause tried in a Court of justice, the report must contain a fair and accurate statement of what took place at the trial: a mere statement by counsel in his opening to the jury, unsupported by evidence, is not a fair and impartial report.

Mr. Serjeant *Atcherley*, contra.—The justification is good pro tanto. *Rex v. Fisher* (e), *Rex v. Lee* (f), *Curry v. Walter* (g), and many subsequent cases, recognise the general right to publish matter of this description. It is for the advantage of the public that that which passes in Courts of justice should be extensively made known. The alleged libel does not affect to give the result of the evidence adduced upon the inquiry to which it refers: the writer merely states that the counsel for one of the parties on the occasion alluded to made a cutting speech, without giving any opinion as to the justice of the remarks so made. It is not necessary in the report of a trial or other judicial investigation that the whole of the evidence should appear; it is enough that the substance is fairly and correctly given, without libellous comment. In *Stiles v. Nokes*, and in *Lewis v. Walter*, the reporter expressed his own opinion, and therefore the report ceased to be privileged.

(c) 6 Dow. & Ryl. 528, 4 Barn. & Cress. 473.

(d) 3 Moore & Payne, 524, 6 Bing. 213.

(e) 2 Camp. 563.

(f) 5 Esp. Rep. 123.

(g) 1 Bos. & Pull. 525, 1 Esp.

Rep. 457. *Duncan v. Thwaites*, 5 Dowl. & Ryl. 447, 3 Barn. & Cress. 556.

Mr. Serjeant *Wilde*, in reply, was stopped by the Court.

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Lord Chief Justice TINDAL.—I am of opinion that the plea demurred to cannot be supported in point of law. The libel complained of is contained in what purports to be an account of proceedings that took place upon the taking of an inquisition under a writ de lunatico inquirendo, under which the plaintiff was summoned and examined as a witness. The libel does not profess to state the proceedings or the evidence of the witnesses at length, but to give merely the result and the opinion of the writer. The defendant by his plea singles out a particular passage, which he proposes to justify, viz. “Mr. Jervis made a splendid speech of two hours’ duration in favour of Mr. Weaver’s sanity, and commented with cutting severity on the testimony of Mr. Owen Owen Roberts;” and alleges that this statement is true. On the part of the plaintiff it is objected that the defendant by this justification assumes to separate the part of the libel thus set out from the rest, and thus alters its tendency. But, reading the whole of the libel together, it is impossible not to perceive that the intention of the writer was, not simply to convey an idea that the speech made on the occasion alluded to was cutting and severe, but that the severity was deserved. He begins with stating that “it was attempted to be proved by the testimony of Mr. Owen Owen Roberts, that, on the 22nd of September last, Mr. Weaver had visited Carnarvon, and was consulting him about a hurt on his leg; that, whilst examining it, Mr. Weaver, in a hurried manner, said—‘Oh, never mind; this is a trifling matter: I have more important concerns to attend to, for I have a compact with the Almighty that I should attend to the conversion of the Jews in this world, while he attends to my interests in the world to come.’ On this evidence it was meant to be inferred that Mr. Weaver was insane at that time and on

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that day; but, Mr. Owen Owen Roberts's testimony being *unsupported* by that of any other person, it failed to have any effect on the jury, Mr. Weaver's religious opinions being enthusiastic, not fanatical. *The object of fixing on the 22nd of September was, to set aside a will supposed to be made on that day, and prejudicial to the interests of some of his family.*" The statements that "it was attempted to be proved &c.," that "it was meant to be inferred," that the plaintiff's testimony was "unsupported," and that the "object" of fixing on the day named was to set aside a will—all clearly shew that the writer of the paragraph intended to convey the imputation that the plaintiff's testimony was untrue, and got up for the occasion, and discredited by the jury. Then, the conclusion, that Mr. Jervis "made a splendid speech, and commented with cutting severity on the testimony of the plaintiff," was calculated, in conjunction with what had gone before, to impress the reader with a notion that the severity was deserved, and the force of it felt by the plaintiff, from a consciousness of its justice. This latter passage, therefore, which the defendant has selected for the purpose of justifying, standing alone, is ambiguous, and admits of a very different construction if taken in conjunction with the rest of the libel; and on that ground the plea is bad. But the plea is also objectionable on a larger ground. Though counsel are necessarily privileged in addressing the Court or jury, it by no means follows that their speeches, lawful in the speaking, may also lawfully be reported. Counsel may be misinformed, or their remarks may be answered in the course of the cause. This doctrine is clearly enforced in the late case of *Saunders v. Mills*, which has been referred to. Besides, here, the defendant has not even professed to give a report of the counsel's speech; but merely the result of his own opinion of it. In order to justify the report of a trial, it must at all events appear that the facts stated are true, and that the account is a fair and bona fide report, and not a mere summary of that

which happens to have made the most impression upon the fancy of the writer.

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Mr. Justice PARK.—Undoubtedly it is beneficial to the public, and tending to the due administration of justice, that what passes in our Courts should be faithfully reported: but at the same time it is not to be suffered that garbled statements, calculated to injure one party or the other, should be sent forth to the world. Neither is it lawful to publish every statement that counsel may think it right to make in addressing the Court, even if such statements be fairly reported. The doctrine upon this subject is luminously laid down by my Lord Chief Justice in *Saunders v. Mills*; and also by Lord Chief Justice Abbott and Mr. Justice Bayley in the case of *The King v. Mary Carlile* (*h*), in the passages cited by me in my judgment in *Saunders v. Mills* (*i*). The distinction between the privilege of counsel and that of the reporter is also well taken by Mr. Justice Bayley in *Lewis v. Walter* (*k*). “It is no justification,” says that learned Judge, “that a defendant has truly stated in his publication the speech made by counsel in stating a case to the jury; he must go further, and shew the truth of the facts there stated. It is the duty of a counsel to state facts, although they may be injurious to the character of individuals; and he is privileged so to do if he speaks conscientiously according to his instructions; but, if it were to follow that others might repeat what he says, it might be most injurious to the character of individuals; for, as to them, the reason of the privilege, which is the advancement of public justice, does not apply.” In *Rex v. Creevey* (*l*), it was held that a member of the House of Commons may be convicted upon an indictment for a libel in publishing in a newspaper the

(*h*) 3 Barn. & Ald. 167.(*k*) 4 Barn. & Ald. 605.(*i*) 3 Moore & Payne, 531.(*l*) 1 Mau. & Selw. 273.

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report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers: and in *Rex v. Lord Abingdon* (*m*), it was also held that an information lies against a member of parliament (a peer) for publishing in a newspaper a speech containing slanderous matter: and yet in both these cases the speaking itself was privileged. In the present case, I think it impossible to read the publication in question without coming to the conclusion that it is libellous, inasmuch as it imputes perjury to the plaintiff: and a defendant has no right to select for justification a part of a libel which standing alone would possibly not be actionable.

Mr. Justice GASELEE concurred.

Mr. Justice VAUGHAN.—I am clearly of opinion, upon the authority of all the cases, that this plea cannot be supported. It is impossible to read the whole publication together without seeing that its tendency is libellous and injurious to the character of the plaintiff.

Judgment for the plaintiff.

(*m*) 1 Esp. Rep. 226.

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LYNG and Another v. SUTTON.

IN trespass for breaking and entering the plaintiff's close, &c., the declaration commenced thus: "A. B. and C. D., by A. W., *complains*, &c.," and stated that the defendant was summoned to answer the "plaintiff." The defendant demurred.

Mr. Serjeant Peake, in support of the demurrer, cited *Morgan v. Sargent* (*a*), where it was held, that, if a declaration on a bail-bond conclude "whereby an action hath accrued to the plaintiff to demand and have of the principal," instead of the bail, and state non-payment by the principal, it is bad on special demurrer.

PER CURIAM.—*Mala grammatica non vitiat chartam.* Here, if the whole were omitted, the declaration would be sufficient:

Judgment for the plaintiff (*b*).

(*a*) 1 Bos. & Pul. 58.

(*b*) Though mala grammatica non vitiat instrumenta, yet, in expressione instrumentorum, mala

grammatica, quoad fieri potest,
vitanda est.—*Pasch.* 3 *Jac.* 1, C.
B., *Bellamy's case*, 6 *Rep.* 38. b.

Wednesday,
April 30th.

Declaration in
trespass com-
mencing—"A.
B. and C. D.
complains," &c.,
and stating that
the defendant
was summoned
to answer the
plaintiff—not
demurral.

MARY ORME, Administratrix of DAVID ORME, deceased,
v. BROUGHTON, Clerk.

Thursday,
May 1st.

THIS was an action brought by the plaintiff, as administratrix of one David Orme, deceased, to recover a com-

Where the ven-
dor of an estate
(the vendee hav-
ing made a de-
posit in part

payment of the purchase money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate.

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pensation in damages for an injury alleged to have been sustained by the personal estate of the intestate in his lifetime, by reason of the breach of a contract entered into with him by the defendant for the sale to him of a messuage and premises.

The first count of the declaration stated that the defendant theretofore, in the lifetime of the said David Orme, to wit, on &c., at &c., agreed with the said David Orme to sell to him, and the said David Orme then and there agreed to buy of the defendant, a certain messuage, land, and premises then and there represented by the defendant to be freehold, at and for a large sum of money, to wit, the sum of 150*l.*, upon and subject to the following amongst other terms and conditions, that is to say, that the said David Orme should pay down immediately a deposit of 20*l.* per cent., in part of the purchase money, and should pay the residue on the 25th March then next, and that the said David Orme should be entitled to the rents and profits from Christmas then next, by paying interest upon the balance of the purchase money from that period to the time of completion, at the rate of 4*l.* per cent. per annum; and that an abstract of the title deeds should be delivered at the expense of the defendant, but that the conveyances of the property, together with the assignments or surrenders of any term or terms, with any attested or other copies, and deed or deeds of covenant, that might be required, should be prepared by and at the expense of the said David Orme: and the plaintiff averred, that, on such agreement for sale as aforesaid, the said David Orme then and there paid to the defendant a large sum of money, to wit, the sum of 150*l.*, as a deposit in part of the said purchase money; and thereupon afterwards, to wit, on &c. aforesaid, at &c. aforesaid, in consideration that the said David Orme, at the request of the defendant, had then and there promised the defendant to perform the said agreement on his the said David Orme's part, he the

defendant promised the said David Orme to perform the said agreement in all things thereby required on his the defendant's part; and that, although the said David Orme, deceased, in his lifetime, to wit, on &c., and from thence until and upon and after the said 25th March then next &c., was ready and willing to perform and fulfil the said agreement in all things therein contained on his part and behalf as such purchaser as aforesaid to be performed and fulfilled, and to pay the remainder of the said purchase money and to complete the said purchase, and, after the death of the said David Orme, the plaintiff, as administratrix as aforesaid, was ready and willing to perform the said agreement on her part; whereof the defendant always had notice; and although the defendant was afterwards, to wit, on the said 25th March, 1830, at &c., requested by the said David Orme, deceased, in his lifetime, and after his death, to wit, on the 1st September, 1833, at &c., was requested by the plaintiff as administratrix as aforesaid, to deliver to them respectively a proper abstract of title to the said tenements, and to shew and make appear a good and sufficient title thereto enabling the defendant to convey or cause to be conveyed the said estate as aforesaid; and although a reasonable time for so doing had elapsed; yet the defendant disregarded the said agreement and his said promise, and did not nor would when he was so requested as aforesaid, or at any time before or since, deliver either to the said David Orme in his lifetime or to the plaintiff as administratrix as aforesaid since the death of the said David Orme, a proper abstract of title to the said messuage and premises, nor did he shew and make appear such good and sufficient title thereto, but, on the contrary thereof, hath hitherto wholly neglected and refused so to do, to wit, at &c. aforesaid, contrary to the said agreement and the said promise of him the defendant: by reason whereof the said David Orme in his lifetime was deprived of all the benefits and advantages which would

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have arisen from the completion of the said purchase, and was then and there put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, in endeavouring to procure such title as aforesaid, and to get the said purchase complete, and in examining such title; and the said David Orme in his lifetime, and the plaintiff as administratrix as aforesaid after the death of the said David Orme, respectively lost divers great gains and profits which they might and would otherwise have respectively made and acquired from using and employing the said sum of money so paid by the said David Orme as a deposit as aforesaid, and other monies provided and kept by the said David Orme in his lifetime for the completion of the said purchase; and thereby also the plaintiff, as administratrix as aforesaid, after the death of the said David Orme, to wit, on &c., incurred divers expenses, to wit, to the amount of 70*l.*, in endeavouring to procure the completion of the said purchase, to wit, at &c.

The second count stated, that, on &c., in consideration that the said David Orme in his lifetime, at the request of the defendant, had then and there agreed to buy of the defendant a certain other messuage and certain other land and premises represented by the defendant to be freehold, at and for a large sum of money, to wit, the sum of 1500*l.*, and had paid to the defendant a certain sum, to wit, the sum of 150*l.*, as a deposit and in part of the said last-mentioned purchase money, and had also agreed to pay the residue thereof, and accept a proper conveyance of the said last-mentioned premises, on the 25th March then next, on having a good and valid title made to him the said David Orme to the last-mentioned premises, he the defendant then and there promised the said David Orme in his lifetime that he would procure an abstract of a good and valid title to the said last-mentioned premises to be furnished to the said David Orme in due and convenient time for enabling him to get such title examined and a

proper conveyance of the said last-mentioned premises prepared and the said last-mentioned purchase completed on or before the 25th March, 1830; yet, the defendant, not regarding his said last-mentioned promise, but intending to deceive the said David Orme in his lifetime, did not nor would, although he was afterwards, to wit, on &c., at &c. aforesaid, requested by the said David Orme in his lifetime (who died since the said 25th March, 1830) so to do, procure an abstract of a good and valid title to the said last-mentioned premises to be furnished to the said David Orme in due and convenient time for enabling him to get such title examined and a proper conveyance of the said last-mentioned premises prepared, and the said last-mentioned purchase completed on or before the said 25th March, 1830; but therein wholly failed and made default, to wit, at &c.; and the defendant then and there wrongfully and injuriously omitted to furnish any abstract of title to the said last-mentioned tenements as last aforesaid for a long and unreasonable time, and until an insufficient and inadequate time remained for the examination of such title and for the preparation of a proper conveyance and the completion of such purchase as last aforesaid by the day so appointed as last aforesaid in that behalf, according to the said last-mentioned promise of the said defendant: and the plaintiff averred, that, by means and in consequence of such neglect and omission as last aforesaid, the said David Orme in his lifetime was deprived of all the benefits and advantages that would have arisen to him from the completion of the last-mentioned purchase, and was then and there necessarily put to great expense, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, in endeavouring to procure the said title as last aforesaid, and lost all the gains and profits which he might and would otherwise have made and acquired from using and employing the said sum of money so paid by him to the defendant as last aforesaid, and other mo-

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nies provided and kept by him the said David Orme for the completion of the said last-mentioned purchase, to wit, at &c.

There were other two special counts, on another contract, similar in substance to the first and second respectively, and the common counts, alleging promises to David Orme in his lifetime, and to the plaintiff as his administratrix after his decease.

General demurrer to the special counts, and joinder.

The demurrer now came on for argument (a).

Mr. Serjeant *Stephen*, in support of the demurrer.—The first and third counts do not allege a breach of the

(a) The points marked for argument on the demurrer books were—

For the defendant—That, if any breach of contract had been committed by the defendant, he was liable for it to the heir of David Orme only, and not to his administratrix: that the defendant might have been liable to this action if any special damage arising from his breach of contract had accrued to the personal estate of Orme in his lifetime; but that he was not liable to the administratrix merely for a breach in such lifetime *without such actual special damage*; and that no such damage was shewn to have so accrued, for that the loss of the deposit and the expenses of investigating the title, &c., would have been equally incurred if the contract had been completed, and that they were consequences of the contract itself, and not of any breach of it by the defendant.

For the plaintiff—That the special counts disclosed a sufficient cause of action resulting to the plaintiff in her character of administratrix, it being alleged that the contract with Orme was broken in his lifetime, and that his personal estate was injured by his being put to expense in endeavouring to procure a conveyance and in examining the title, and being deprived not only of the benefit of the purchase and of the profit he might have made, but also of the use of the deposit he had paid: That it did not distinctly appear that the intestate was to have a conveyance of the freehold, it being only alleged that the defendant represented that the premises were freehold; and, if they were, and the intestate was to have had the freehold conveyed to him, the defendant should have pleaded that matter specially, or shewn it at the trial as ground of nonsuit.

contract in the lifetime of the intestate; the second and fourth do; but in none of them is it shewn that any injury has been sustained by the personal estate of the intestate, and therefore, if any action at all be maintainable in respect of the alleged breaches, it can only be at the suit of the heir. The breach in the first count, as to the non-delivery of the abstract, is ill assigned, and does not apply to the contract; for, the contract on the part of the defendant was, merely to deliver *an abstract of title*, not a *good or proper abstract*, nor specifying any particular time; whereas the breach is, for not delivering a *proper abstract*, and the intestate died before the time at which the purchase was to be completed. The contract was, to execute a conveyance of, and make title to, the freehold, in which the personal representative can have no interest. To enable the administratrix to maintain this action, she must shew a contract with the intestate, a breach in his lifetime, and an injury accruing therefrom to the personal estate of the intestate—*Kingdon v. Nottle* (*b*), *Knights v. Quarles* (*c*). [Lord Chief Justice *Tindal*.—In *Kingdon v. Nottle*, the action was upon a covenant under seal: here the contract is by parol; how then could the heir maintain an action upon it?] Where a party seeks to recover damages for the breach of a contract, or where it is sought to recover interest on the deposit, or where the action is brought for not furnishing an abstract by the time specified, the declaration must allege that the contract is rescinded—*Farquhar v. Farley* (*d*), *Richards v. Barton* (*e*), *Wilde v. Fort* (*f*): whereas here, for any thing that appears on the face of the declaration, the contract is still open, and capable of being enforced by the heir; and therefore the wrong, if any, has been sustained by him.

(*b*) 1 Mau. & Selw. 355. 592.

(*c*) 4 J. B. Moore, 532, 2 Brod. & Bing. 102. (*e*) 1 Esp. Rep. 268.

(*d*) 1 J. B. Moore, 322, 7 Taunt.

(*f*) 4 Taunt. 334.

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[Lord Chief Justice *Tindal*.—The declaration alleges that a reasonable time has elapsed for delivering the abstract; and, by bringing the action, the plaintiff has declared his election to consider the contract to be at an end.] The first count, at all events, treats the contract as open; and the mere bringing an action does not rescind the contract; notice should be given of the party's intention to consider it at an end, as in *Roper v. Coombes* (*g*). The case of *King v. Jones* (*h*) is in principle the same as the present, except that there the contract was under seal; and the Court held that the heir, and not the executor, alone could sue in respect of a breach of covenant in the lifetime of the covenantee. The special damage, too, is alleged too largely: the loss of advantages contingent on a bargain cannot properly be made the subject of an action—*Fleurieu v. Thornhill* (*i*).

Mr. Serjeant *Wilde*, contra.—Although the contract relate to land, yet, if damage result from the breach of it to the personal estate of the testator or intestate during his life, his personal representative must sue, and not the heir; the heir cannot sue in respect of a parol contract entered into with his ancestor. In *Kingdon v. Nottle*, there was an entire absence of damage to the personal estate, and therefore the action was held to be rightly brought by the heir. In *Lucy v. Levington* (*k*), it was resolved that an executor might bring an action of covenant for quiet enjoyment, on a covenant with the vendee, his heirs and

(*g*) 9 Dow. & Ryl. 562; 6 Barn. & Cress. 534.

(*h*) 1 Marsh. 107, 5 Taunt. 418, 4 Mau. & Selw. 188. Upon a covenant with A. and his heirs to do all lawful and reasonable acts for further assurance, upon request, and a request made by the purchaser in his life to levy a fine,

and neglect so to do, the ancestor not being evicted in his life, but the heir being evicted afterwards, the heir may maintain an action upon the request of the ancestor and refusal made to him.

(*i*) 2 Sir W. Blac. 1078.

(*k*) 2 Lev. 26, 1 Vent. 176.

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assigns, as, the eviction being to the testator, he could not have an heir or assignee of the land; and therefore that the damages belonged to the executor, though not named in the covenant, for he represented the person of the testator. In the present case, it does not appear whether the vendor had any estate or not: no abstract was delivered. Then, there is a sufficient allegation of damage to the personal estate of the intestate to enable the plaintiff to maintain this action, viz. the expenses the intestate was put to in endeavouring to procure a title, and the loss of the profits which he would otherwise have acquired from the use of the money paid to the defendant by way of deposit. The personal estate was diminished by the amount of the deposit, as well as by the loss of interest thereon, and the loss of the profits that would have accrued to the intestate from the estate if conveyed to him—Went. Off. Ex. 65—Williams Off. Ex. 518—Roscoe on Real Actions, 445. In *Knights v. Quarles*, where the plaintiff as administrator declared that the intestate had retained the defendant as his attorney to investigate and procure a good title of an estate about to be conveyed to the intestate as the purchaser, and assigned for breach that he did not do so, but accepted a defective title in the lifetime of the intestate, whereby his personal estate was injured—it was held that the action was well brought by the administrator. There, the allegation of damage to the personal estate of the intestate was general; here it is shewn specially. If the deposit be recovered back, no action or other proceeding can afterwards be had upon the contract: and no notice can in such case be necessary to rescind the contract.

Mr. Serjeant *Stephen*, in reply.—The right to have a conveyance of the property in question, supposing the contract to be existing, devolves to the heir; and there is no such allegation of damage to the personal estate of the

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intestate as will entitle the administratrix to sue. It does not follow that the personal representative may sue because the heir cannot. In *Knights v. Quarles*, it was alleged in the declaration that the personal estate was diminished in value; and that fact was admitted by the demurrer: but here the allegation is repugnant. In *Chamberlain v. Williamson* (*1*), the question was whether a right of action for a personal tort to the testator passed to the executor; and it was held that it did not unless special damage were shewn. The breach in the first count is clearly bad; it is not warranted by the contract: the defendant was not bound to deliver an abstract of a good title, but only of such a one as he possessed.

Lord Chief Justice TINDAL.—The question in this case arises upon a general demurrer to the four special counts of the declaration; and, if we can see that either of those counts is sufficient, the plaintiff will be entitled to judgment. It appears to me that the second count is free from objection. The only point for consideration is whether or not there is alleged on the face of the second count a personal contract by the defendant with the intestate, a breach in his lifetime, and a loss to his personal estate. If these three circumstances concur, the present case falls within the principle of that of *Kingdon v. Nottle*, and therefore our judgment must be for the plaintiff. In the first place, the count states an agreement between the intestate and the defendant, whereby the former agreed to purchase of the defendant certain premises for the sum of 150*l.*, and that a deposit of 15*l.* was paid by the intestate in part of the purchase money; that the purchase was to be completed by the 25th March, 1830; that the defendant agreed to furnish an abstract of his title to the premises in sufficient time to allow the purchaser an opportunity to examine

and investigate the title before that day; and that the defendant was requested by the intestate to furnish the abstract, but that he neglected so to do. It is further alleged that the intestate outlived the time when the purchase was to be completed. Now, stopping there, it appears that a deposit of 150*l.* was paid by the purchaser to the vendor, and that the day appointed for the completion of the purchase and sale had been suffered to go by without the purchaser having had an opportunity to investigate the title. If the intestate himself had brought an action for this breach of contract, there could be no objection to its maintenance in this form. One argument that has been urged on the part of the defendant is, that, consistently with this record, the contract still exists, and that the intestate, notwithstanding he had recovered damages in an action of this sort, might still proceed at law for the breach of contract, or in equity for a specific performance. But I think it would be impossible, after having brought one action in which the gravamen alleged is the damage accruing from the breach of contract, to sue again in respect of the same contract, or otherwise seek to enforce the performance of it; the plaintiff having by the first action declared his election. This action, however, is not brought by the intestate, but by his administratrix; and we must see whether or not there has been any injury to the personal estate of the intestate in respect of which he could have sued in his lifetime; for, if he could, the plaintiff, as his personal representative, will also have an undoubted right to sue. It is admitted that the allegation of damage which the plaintiff is not entitled to claim—as, for loss of advantages that might have resulted from the bargain—will not, on a general demurrer, vitiate that part of the count which is good. The allegation, therefore, that “by means and in consequence of the neglect and omission aforesaid, the said David Orme in his lifetime was deprived of all the benefits and advantages that

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would have arisen to him from the completion of the purchase," may be rejected, and may be struck out of the declaration before the assessment of damages takes place. The count further alleges an expenditure of personal property by the intestate in consequence of the defendant's breach of contract: it states that he was "necessarily put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, in endeavouring to procure the said title as aforesaid, and lost all the gains and profits which he might and would otherwise have made and acquired from using and employing the said sum of money so paid by him to the defendant, and other monies provided and kept by him the said David Orme for the completion of the said purchase." That is an injury to the personal property of the intestate, and is alleged as an injury to the plaintiff as administratrix; and therefore the case falls within *Kingdon v. Nottle*. If the present plaintiff could not recover in this action, it could be maintained by no one; for, it is perfectly clear that the heir could not sue. I think, for the reasons above stated, that the plaintiff is entitled to judgment on the second count.

Mr. Justice PARK.—From the case of *Lucy v. Levington*, to the present time, all the decisions upon this point have been uniform. The principle which supports this case is clearly laid down in *Kingdon v. Nottle*, viz. that, where the breach occurs in the lifetime of the testator or intestate, and an injury accrues to his personal estate, the action must be brought by his personal representative, and not by the heir. Mr. Justice Le Blanc says: "The distinction which attends real and personal covenants, with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to his heir, and must be taken advantage of by him alone;

but personal covenants must be sued for by the executor." The same opinion is expressed by Mr. Justice Heath, in delivering the judgment of the Court in *King v. Jones*. He says (*m*): "The ultimate damage not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personality), in preference to the executor. The recent decision is that of *Kingdon v. Nottle*, wherein the Court of King's Bench held that the executor could not recover upon a breach of the defendant's covenant with the testator, that he, the defendant, had a good title to convey, the testator having sustained no damage in his lifetime; therefore it follows that the heir might so recover. The Court there follow the doctrine of *Lucy v. Levington*, and they advert to the circumstance which differs that case from this, that there the ultimate damage was sustained in the time of the ancestor, and therefore the land did not descend to the heir; consequently, the covenant which runs with the land did not descend to the heir." With respect to *Knights v. Quarles*, in the decision of which I concurred, and which has been much relied on for the defendant, I think it is impossible by the greatest ingenuity to shew that that case has the least bearing against our judgment on the present occasion. A more laborious, patient, and considerate Judge than my Lord Chief Justice Dallas never existed; his judgments are entitled to the greatest respect: he decided *Knights v. Quarles* after hearing counsel on one side only. Mr. Justice Burrough and Mr. Justice Richardson, both very able men, concurred with him: and in the opinion I expressed (*n*) I mainly relied upon the last words of *Lucy v. Levington*, as reported in *Ventriss*, where it is stated that "it was agreed by all the

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(*m*) 5 Taunt. 428.

(*n*) 4 J. B. Moore, 539.

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Justices (of whom Lord Hale was one), that, though the covenant were made only to J. S., his heirs and assigns, and it were an estate of inheritance, yet, the breach being in the testator's lifetime, the executor had well brought the action for the damages."

Mr. Justice GASELEE.—I am clearly of the same opinion as to the second count of the declaration. The case of *Lucy v. Levington* distinctly lays it down, that, where an injury is sustained by the personal estate, the personal representative must bring the action. If the administratrix cannot sue in this case, no action at all could be maintained, for it is clear that the heir could not sue. In all the cases where the action has been brought by the heir, the covenant has been with the party and his heirs. In *Kingdon v. Nottle*, the breach affected the inheritance, and therefore the action was brought by the heir. In *Wotton v. Cooke* (o), the covenant was, each with the other and his heirs. It is unnecessary to give any opinion upon the first and third counts, though I incline to think they are sustainable; for, the demurrer being to the whole declaration, if one count be sufficient the plaintiff will be entitled to judgment; and the second and fourth counts are clearly good.

Mr. Justice VAUGHAN.—I entirely agree with the rest of the Court. I have looked into all the cases, and I find no difference of opinion as to the rule of law, but only in its application to the circumstances of each particular case. To entitle the personal representative to maintain an action, there must have been a breach in the lifetime of the testator or intestate, and an injury to his personal estate. Here it is alleged on the face of the record that the defendant contracted with the intestate to convey certain

(o) Dyer, 337. b.

premises to him by a given day; that the purchaser was to have the profits from that day; and that he paid a deposit of 150*l.* in part of the purchase money: it is then averred that the defendant failed to shew a good title (as he had impliedly contracted to do); and that the intestate suffered a loss in being deprived of the use of the deposit. Under these circumstances, the intestate alone could bring an action for the breach of this contract; the injury clearly affecting the personal estate: and no further proceedings could be resorted to.

Judgment for the plaintiff on the second and fourth counts, for the defendant on the first and third.

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USBORNE and Another v. PENNELL.

*Thursday,
May 1st.*

THE defendant in this case was arrested and held to bail as the acceptor of a bill of exchange, at the suit of indorsees. The writ of capias was indorsed "Bail by affidavit for 600*l.*:" the praecipe was as follows:—"In the Common Pleas. Middlesex. Capias for Thomas Usborne and Major Usborne, against George Pennell of Dean Street, Soho, in the county of Middlesex; upon promises. M'Leod & Henning, 3 London Street, Fenchurch Street, April 19, 1834."

It is no ground for setting aside a writ of capias, that the praecipe omits to state the amount of the debt sworn to.

An affidavit to hold to bail on a bill of exchange (by indorsee against acceptor) need not aver a presentment for payment.

Mr. Serjeant *Wilde* obtained a rule nisi to set aside the writ of capias, and that the bail-bond given by the defendant on his arrest might be delivered up to be cancelled, on the defendant entering a common appearance—on the ground that the praecipe omitted to state the amount of the debt sworn to.

He also submitted that the affidavit to hold to bail was

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insufficient, inasmuch as it did not state that the bill was presented for payment, but only that it was due at a day past, and remained unpaid. But the rule was refused upon this point.

Mr. Serjeant Bompas shewed cause.—There is no positive rule on the subject in this Court or in the Court of King's Bench; but only in the Exchequer (*a*); and there the oath is not required to be stated. The præcipe is a mere direction to the officer for issuing the writ, but is no part of the writ itself. It is not the præcipe that authorises the indorsement on the writ that informs the sheriff of the sum in which he is to take bail, but the affidavit, which may always be referred to at the office. In *Boyd v. Durand* (*b*), where it was held that the instructions called a præcipe given by the attorney to the filacer are not process in the cause—Sir James Mansfield said—“A præcipe is a nonsensical word as applied here. A præcipe is the name of a writ, but this is a little worthless memorandum which is no authority at all. The real præcipe is the first authority.” The statute 2 Will. 4, c. 39, only gives the form of the writ; it contains no directions as to the form of the præcipe.

Mr. Serjeant Wilde, in support of the rule.—The præcipe is the only record remaining in the office to shew the nature of the writ that has been issued; and therefore it is most material that there should be no variance between them. Formerly, when the writ was filled up by the officer, the præcipe was the only instruction to enable him so to do; though now it is the practice for the attorney to prepare the writ, and to cause it to be signed by the filacer: and it has always been the practice to state in the præcipe that which will enable a party looking at it to say

(*a*) Reg. Gen. Michaelmas Term, Rules, 3rd edit. p. 5.

1 Will. 4, Practice, 1. Jervis's (*b*) 2 Taunt. 161.

whether the writ issued thereon is bailable or not (c). In the Court of Exchequer there is a positive rule upon the subject.

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Lord Chief Justice TINDAL.—This is not a case in which the complaint is, that there is a variance between the sum indorsed on the writ and that inserted in the præcipe, so that the defendant might have been misled; but the complaint is that no sum at all is mentioned in the præcipe; and the question is whether that omission constitutes such a defect in the præcipe as will entitle the defendant to be discharged from the arrest. I think it does not. Although it seems to have been the universal practice to insert the amount of the oath in the præcipe, no instance has been shewn where either of the Courts has discharged a defendant out of custody on the ground of a defect in this particular; and it can scarcely be imagined but that some instance of such an omission must have occurred in the course of years. In *Boyd v. Durand*, the præcipe was considered to be of so little account that it was held unnecessary that it should contain an ac etiam clause, and that a variance in that respect was immaterial. Could the defendant suffer any substantial injury from the omission? Certainly not. The præcipe is for a writ of *capias*, a name only applied, since the statute 2 Will. 4, c. 39, to bailable process issuing out of this Court; and therefore there could be no doubt as to whether the process issued upon this præcipe was bailable or not. The affidavit is the proper document to shew the sum sworn to. Neither in the statute, nor in the schedule annexed thereto, nor in the rules founded thereon, is any reference made to the præcipe. The rule referred to, of the Court of Exchequer, relates to serviceable process only. In the absence therefore of any authority to warrant it, and of

(c) See the forms, *Tidd's Appendix* to the 9th edit. of the Practice, ch. 8, ss. 20, 22, et seq.

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any suggestion of prejudice to the defendant from the form of praecipe used on the present occasion, I think the defendant is not entitled to his discharge.

Mr. Justice GASELEE.—Formerly a praecipe was necessary in the King's Bench for suing out a writ of habere facias possessionem; but not in this Court (*d*): by the 76th rule of Hilary Term, 2 Will. 4, the practice of the King's Bench is made to conform in this respect with that of this Court.

The rest of the Court concurring—

Rule discharged.

(*d*) Tidd's Practice, 9th edit. p. 1244.



**HASLAM and BISCHOFF, Gents., two &c., v. SHERWOOD,
 Gent., one &c.**

*Friday,
 May 2nd.*

An agreement was entered into between the plaintiff (the solicitors under a commission of bankrupt issued against one W., which he was desirous of superseding) and the defendant (the solicitor of the bankrupt), whereby the plaintiff undertook to hold themselves liable to account

to the defendant for any balance that might remain out of a sum received by them from a debtor to the estate, after satisfying their claim for costs and the claims of the accountant and messenger; and the defendant agreed, in the event of the sum so received by the plaintiff proving inadequate to cover those claims, to pay the plaintiff the difference:—Held, that, in the absence of an averment in the declaration that the commission against W. was superseded, or that the creditors consented to the above arrangement, there was no valid consideration for the defendant's promise.

THE first count of the declaration stated, That theretofore, to wit, on the 4th January, 1832, to wit, in &c., by a certain memorandum of agreement then and there made relating to the matter of E. P. Wills, a bankrupt, in which said bankruptcy the plaintiffs were then and there concerned as solicitors—reciting that the bill of costs of the plaintiffs not being made up to that time, and the further costs not then ascertainable, and the messenger's charges not known, and the defendant, the solicitor for the bankrupt and his friends, being desirous that a composition, re-

lease, assignment, and petition for a supersedeas, should nevertheless be proceeded with, and the messenger discharged out of possession—it was by the memorandum of agreement mutually stipulated, arranged, and agreed by and between the plaintiffs and the defendant, that the plaintiffs should hold themselves liable to account for any balance to the defendant on request out of a sum of 140*l.* 9*s.* 11*d.* by the plaintiffs before then received of Thomas Gould, a debtor to the estate, which might remain beyond the plaintiffs' costs and charges as between solicitor and client in the said bankruptcy and other matters done and to be done; and that, in the event of the said 140*l.* 9*s.* 11*d.* proving inadequate to cover the same, and the accountant's bill, amounting to 14*l.* 15*s.* 9*d.*, and the messenger's bill under the said commission, the defendant, upon the like request, should pay the plaintiffs the difference: and, the said memorandum of agreement being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, to wit, in &c. aforesaid, in consideration thereof, and also in consideration that the plaintiffs, at the request of the defendant, had then and there promised the defendant to perform and fulfil the said memorandum of agreement in all things on their part and behalf to be performed and fulfilled, the defendant then and there promised the plaintiffs to perform and fulfil the said memorandum of agreement in all things on his part and behalf to be performed and fulfilled: And the plaintiffs in fact said, that, from the making of the said memorandum of agreement hitherto, they always held themselves liable and were always ready to account on request to the defendant for any balance which could or might have accrued to him under or by virtue of the said memorandum of agreement, out of the said sum of 140*l.* 9*s.* 11*d.* so received by them as aforesaid, according to the said memorandum of agreement and their said promise as aforesaid, to wit, in &c. aforesaid: And the plaintiffs further said, that, although they received the

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said sum of 140*l.* 9*s.* 11*d.*, as in the said memorandum of agreement mentioned; yet the costs and charges of the said plaintiffs, as between solicitor and client, in the said bankruptcy and other matters done as in the said memorandum of agreement mentioned, amounted in the whole to a large sum of money, to wit, to the sum of 120*l.* 4*s.* 3*d.*: And the plaintiffs further said that the accountant's bill in the said memorandum of agreement mentioned, amounted in the whole to a large sum of money, to wit, to the sum of 14*l.* 15*s.* 9*d.*, and also that the messenger's bill under the said commission, as in the said memorandum of agreement mentioned, amounted also in the whole to a large sum of money, to wit, the sum of 44*l.* 9*s.* 4*d.*; which said several two last-mentioned sums of money the plaintiffs had paid, &c.; all which said several sums of money exceed the aforesaid sum of 140*l.* 9*s.* 11*d.* so by the plaintiffs received as aforesaid, by a large sum of money, to wit, by the sum of 38*l.* 19*s.* 5*d.*, being the said difference in the said memorandum of agreement mentioned: of all which said several premises the defendant afterwards, to wit, on the 7th May, in the year aforesaid, in &c. aforesaid, had notice: by reason whereof, and according to the tenor and effect of the said memorandum of agreement, the defendant became liable to pay to the plaintiffs the said last-mentioned sum of money, being such difference as aforesaid, on request, to wit, in &c. aforesaid; yet the defendant, although afterwards, to wit, on &c. aforesaid, in &c. aforesaid, he was requested by the plaintiffs so to do, had not yet paid the said last-mentioned sum of money or any part thereof to the plaintiffs, but to pay the same had hitherto wholly neglected and refused, and still did neglect and refuse, contrary to the said memorandum of agreement, and his said promise, to wit, in &c. aforesaid.

The second count stated, That, before and at the time of the making of the memorandum of agreement and promise of the defendant thereinafter next mentioned, a cer-

tain bankruptcy was pending against the said E. P. Wills, and the defendant was concerned as the solicitor of the bankrupt, and the plaintiffs were concerned under and relating to the said last-mentioned bankruptcy, and which said last-mentioned bankruptcy the parties were desirous of superseding by consent and mutual agreement; and whereas also at that time certain costs were due and other costs would have become due to the plaintiffs in and relating to the said last-mentioned bankruptcy and other matters connected therewith, and certain fees and charges were due to an accountant and to the messenger in the last-mentioned bankruptcy, but the amount of the said costs, fees, and charges had not then been ascertained: and whereas also the plaintiffs had before that time received on account of the said last-mentioned bankruptcy, from one T. Gould, a debtor to the estate, a certain sum of money, to wit, 140*l.* 9*s.* 11*d.*, and thereupon theretofore, to wit, on &c., to wit, in &c. aforesaid, by a certain other memorandum of agreement then and there made relating to the matter of the said E. P. Wills, a bankrupt, reciting, amongst other things, that the defendant was desirous that the petition for a supersedeas of the said last-mentioned bankruptcy should be proceeded with, it was stipulated, arranged, and agreed by and between the plaintiffs and the defendant that the plaintiffs should hold themselves liable to account for any balance to the defendant, on request, out of the said last-mentioned sum of 140*l.* 9*s.* 11*d.* which might remain beyond the plaintiffs' costs and charges as between solicitor and client in the said last-mentioned bankruptcy and other matters done and to be done, and that, in the event of the said last-mentioned sum of 140*l.* 9*s.* 11*d.* proving inadequate to cover the same, and the accountant's bill, amounting to 14*l.* 15*s.* 9*d.*, and the messenger's bill under the said last-mentioned bankruptcy, the defendant, upon like request, should pay to the plaintiffs the difference: and the said last-mentioned memorandum

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of agreement being so made, &c.—mutual promises, averments, and breach, as in the first count.

There were also counts for work and labour, the money counts, and a count upon an account stated. Plea, the general issue.

The question was, whether the first count above set out disclosed a sufficient consideration for the defendant's promise to entitle the plaintiffs to maintain the action.

Mr. Serjeant Atcherley, for the plaintiffs.—There is no want of consideration on the face of the agreement set out in the declaration, for the defendant's promise. The contract was binding on the defendant in one event, and on the plaintiffs in another: the defendant binds himself personally to pay to the plaintiffs, on request, the difference in case the sum already received by the plaintiffs on account of the bankrupt's estate should prove inadequate to the discharge of the several claims mentioned in the agreement. In *Burrell v. Jones* (*a*), where the solicitors of the assignees of a bankrupt tenant on whose lands a distress had been levied by the landlord, gave a written undertaking in the following terms: “We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained”—it was held that they were personally liable. Lord Chief Justice Abbott there said: “The expression ‘we, as solicitors,’ binds those who personally signed it. Many persons will deal with solicitors and professional men (from a confidence they have in their known character and situation in life,) who will not deal with an unknown client. It would be preventing much of the ordinary business of life, if we were to hold that a solicitor entering into such a contract as this did not make himself personally responsible. It is for him to consider the probable effect of such an instrument before he signs

(a) 3 Barn. & Ald. 47.

it." And in *Iveson v. Conington* (*b*), where the respective attorneys in a horse cause signed an undertaking whereby they personally consented, undertook, and agreed that the record should be withdrawn; that the defendant should take back the horse in the pleadings named, and should pay a certain sum to the plaintiff; and that the costs of the suit on the part of the defendant should be taxed, &c.—the Court said: "This clearly amounts to a personal agreement binding upon the parties who have signed it. We think, that, when an attorney says 'I personally undertake' to do so and so, he is pledging his personal responsibility; and this case is not distinguishable in principle from *Burrell v. Jones*." Neither is the present. The plaintiffs personally bound themselves to account to the defendant on request for any balance that might remain of the sum received by them from Gould, after payment of their own bill of costs, and the accountant's and messenger's bills: and this was an engagement they might legally make, and consequently a good consideration for the defendant's promise.—If the situation of the parties were reversed, and this action had been brought by the defendant against the plaintiffs for not accounting for the balance pursuant to their undertaking, they could not be permitted to set up as a defence to that action that such their undertaking was illegal, and the agreement nudum pactum: therefore the consideration is sufficient.

Mr. Serjeant Bompas, for the defendant.—In the cases cited there was abundant consideration for the respective promises—in *Burrell v. Jones*, the abandonment of a distress lawfully taken—in *Iveson v. Conington*, the withdrawal of the record in a cause ready for trial. Here, however, the only consideration for the defendant's promise was, an undertaking by the plaintiffs to do an act which they could not legally perform—to pay over to the defendant the balance (if there should be any) of a sum

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which they held, the property of Wills's assignees; a thing which the record discloses no legal right in them to do, for there is no averment in the declaration that the commission had been superseded, neither is it averred that the creditors consented to the proposed arrangement. In *Harvy v. Gibbons* (c), the plaintiff declared that he being bailiff to J. S., the defendant, in consideration that he would discharge him of 20*l.* due to J. S., promised to expend 40*l.* in repairing a barge of the plaintiff's; and judgment for the plaintiff was reversed, the consideration being illegal, for the plaintiff could not discharge a debt due to his master. And in *Nerot v. Wallace* (d), it was held that a promise made by a friend of a bankrupt when he was on his last examination, that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, was void, as being against the policy of the bankrupt laws.

Mr. Serjeant *Atcherley* was heard in reply.

Lord Chief Justice TINDAL.—It appears to me that the special counts on this record are insufficient to authorize us to direct judgment to be entered for the plaintiffs. On the face of the declaration, the consideration stated for the defendant's undertaking is illegal, for want of an allegation that a supersedeas of the commission issued against Wills, the bankrupt, had actually taken place, or that his creditors had consented that the plaintiffs should enter into the contract with the defendant for the breach of which this action is brought. It has been argued on the part of the plaintiffs, that, if the situation of the parties were reversed, and this action had been brought by the defendant for a breach of the contract by

the plaintiffs, they would not be allowed to set up as a defence the illegality of the consideration. This might be so; for, in many cases, a party is estopped from disputing the validity of his own contract. But here, to entitle themselves to maintain this action, the plaintiffs were bound to shew such a contract on their part as they could legally perform; otherwise the defendant's promise is without consideration. What then is the nature of the contract? It appears that a commission had issued against Wills, and that it was thought desirable that it should be superseded; whereupon the plaintiffs, who were the solicitors to the commission, and had in that character received from one Gould, a debtor to the bankrupt's estate, a sum of 140*l.* 9*s.* 11*d.*, undertook to account to the defendant, who acted as the solicitor of the bankrupt and his friends, for any balance of that sum that might remain after satisfying the demands of the plaintiffs themselves, and of certain other persons, for costs incurred in the working of the commission. Whilst the commission remained unsuperseded, the money with which these parties affected to be dealing was the property of the assignees. Unless, therefore, there was a supersedeas, or a consent on the part of the creditors of Wills to the proposed arrangement, it was not competent to the plaintiffs to give any such undertaking. There being no allegation of any supersedeas or of any such consent of the creditors, there appears to be no consideration whatever for the defendant's promise; and therefore the judgment must be arrested.

Mr. Justice PARK.—The declaration is clearly defective. The plaintiffs had no right to dispose of the property of the bankrupt in the way they contracted to do. As it appears to have been agreed that a supersedeas should issue, and did in fact issue, if this had been aver-

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red in the declaration it would have rendered the agreement legal. It not being so stated, however, the judgment must be arrested.

The rest of the Court concurring—

Judgment arrested.

*Friday,
May 2nd.*

The declaration stated, that, by a certain indenture of mortgage, it was witnessed, that, in consideration of the sum of 1400*l.* then due to the plaintiffs from the defendants, the latter conveyed certain premises to the former, subject to a proviso, that, if the defendants should pay or cause to be paid to the plaintiffs the said sum of 1400*l.* on the 19th March, 1833, the plaintiffs should reconvey the premises to the defendants; and the defendants covenanted that they would pay

*to the plaintiffs the said sum of 1400*l.* at the time and in manner thereinbefore appointed for payment of the same:* Breach, non-payment of the 1400*l.*, and interest, at the time and in the manner in the said indenture appointed for payment of the same:—Held, a sufficient allegation of the day of payment; and that the claim for interest in the breach, none being reserved by the indenture, did not vitiate the declaration, but might be struck out.

TILDASLEY and Another v. STEPHENSON and Another.

THIS was an action of covenant. The declaration stated, that theretofore and in the lifetime of one T. Sims, since deceased, to wit, on the 19th of March, 1831, in &c., by a certain indenture then and there made between the defendants of the first part, one R. Finlow of the second part, and the said T. Sims and the plaintiffs of the third part, it was witnessed, that, in consideration of the sum of 1400*l.* of lawful money &c. being then justly due and owing to the said T. Sims and the plaintiffs by and from the defendants, as therein mentioned, and also for the other considerations therein mentioned, they the defendants and the said R. Finlow, according to their several and respective estates and interests in the premises, and not further or otherwise, did grant, bargain, sell, alien, release, and confirm unto the said T. Sims and the plaintiffs (in their actual possession then being by virtue of a bargain and sale to them thereof made by the defendants

and the said R. Finlow, by indenture bearing date the day next before the day of the date of the said indenture, for one whole year commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to their heirs and assigns, a certain piece or parcel of land, with the two several messuages or dwelling-houses thereon erected, in the said indenture more particularly described, together with the appurtenances, to have and to hold the said piece or parcel of land or ground, messuages or dwelling-houses, hereditaments, and premises, with the appurtenances, thereby released unto the said T. Sims and the plaintiffs, their heirs and assigns, as tenants in common, and not as joint tenants, to the only proper use and behoof of the said T. Sims and the plaintiffs, their heirs and assigns, as tenants in common, and not as joint tenants, for ever; subject nevertheless to the proviso or agreement for redemption of the said land, messuages, hereditaments, and premises thereafter contained; that is to say, provided always, and it was thereby declared and agreed by and between the said parties to the said indenture, that, if the defendants, their heirs, executors, administrators, or assigns, should pay or cause to be paid unto the said T. Sims and the plaintiffs, their heirs, executors, administrators, or assigns, the said sum of 1400*l.* so due and owing to them as aforesaid, on the 19th day of March, 1833, without making any deductions out of the said sum of money or any part thereof for taxes or on any other account whatsoever, then and immediately thereupon the said T. Sims and the plaintiffs, their heirs and assigns, should, at the request, costs, and charges of the defendants, their heirs or assigns, re-convey or re-assure the said messuages, lands, &c., thereby granted and released or otherwise assured or intended so to be, unto and to the use of the defendants, their heirs or assigns, in such manner as they should direct, free from all charges

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and incumbrances to be made or occasioned by T. Sims and the plaintiffs, their or either or any of their heirs or assigns in the mean time: and the defendants thereby for themselves jointly and severally, and for their respective heirs, executors, administrators, and assigns, did and each of them did thereby covenant and agree with Sims and the plaintiffs, their heirs, executors, administrators, and assigns, amongst other things, in manner following, that is to say, that the defendants, their heirs, executors, administrators, or assigns, would duly pay or cause to be paid to Sims and the plaintiffs the said sum of 1400*l.* *at the time and in manner thereindbefore appointed for payment of the same,* according to the true intent and meaning of the said indenture; as by the said indenture, reference being thereunto had, will more fully and at large appear. The plaintiffs then averred, that, after the making of the said indenture, to wit, on the 1st June, 1832, in &c. aforesaid, the said T. Sims died, and that the defendants did not (although often requested so to do) during the lifetime of T. Sims duly pay or cause to be paid to Sims and the plaintiffs, nor to the plaintiffs since the death of Sims as aforesaid, the said sum of 1400*l.*, or any part thereof, in the time and in manner in the said indenture appointed for payment of the same, or at any other time or in any other manner, according to the true intent and meaning of the said indenture, and of the said covenant of the defendants so by them made in that behalf as aforesaid; but the whole of the said sum of 1400*l.*, *and interest thereof,* still remains wholly due and unpaid to the plaintiffs, contrary to the said covenant of the defendants in that behalf: and so &c.

The defendants demurred specially, assigning for causes (amongst others), that it was in the said declaration recited and alleged that the defendants by the said indenture covenanted with Sims and the plaintiff that the defendants would duly pay or cause to be paid to Sims and the plain-

tiffs the said sum of 1400*l.* at the time and in manner thereinbefore appointed for payment of the same; whereas it was not stated nor did it appear from the said declaration what was the time and manner so appointed by the said indenture, or that any time or manner was so thereinbefore appointed, or where or how the said sum was to be paid according to the true intent and meaning of the said indenture, or whether the time for payment thereof (if now past) happened in the lifetime of Sims or since his death; and that it was altogether uncertain whether or how, according to the said covenant as set forth in the said declaration, the said money was to be paid: and also for that the plaintiffs alleged as a breach of the said covenant that the whole of the said sum of 1400*l.* and *interest thereof* remained wholly due and unpaid; whereas it did not appear in or from the declaration or the said covenant that any interest was payable or to be paid on the said sum of money; and also that the breach in the said declaration assigned varied from the sense and substance of the said covenant, and extended beyond the terms and obligation of the same.

The plaintiffs joined in demurrer (*a*).

(*a*) The points intended to be argued on the part of the defendants were:—That the plaintiffs, in setting out the covenant for payment of the 1400*l.*, had not stated the time or manner where or how the money was to be paid, but referred to the time and manner thereinbefore, that is, in the said indenture before appointed: but, as the plaintiffs did not set forth *the whole* of the indenture in their declaration, it did not certainly appear in or from the declaration what was the time or manner referred to by the cove-

nant; that the plaintiffs alleged in their breach that the whole of the sum of 1400*l.* and interest thereof was due and unpaid to the plaintiffs, and it did not appear from any part of the indenture as set forth in the declaration that interest was to be payable upon or in respect of the 1400*l.*

For the plaintiffs.—That the declaration set forth an ordinary mortgage, with proviso for redemption on payment of a sum named at a day specified, without deduction; that the covenant to pay the sum at the time and in manner

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Mr. Serjeant Atcherley, in support of the demurrer.—The breach assigned is the nonpayment of the sum of 1400*l.* at the time and in the manner in the said indenture appointed for payment of the same, according to the true intent and meaning of the covenant: whereas in the indenture set out on the record no time is appointed for payment. The only day mentioned is that stated in the proviso for a reconveyance by the plaintiffs in case the money were paid by a given day. The proviso is in the nature of a defeazance.—Then, there is no reservation of interest on the face of the instrument: and the nonpayment of interest is not assigned by way of special damage; there is a mere allegation that the principal and interest are unpaid.

Mr. Serjeant Goulburn, contra, was stopped by the Court.

Lord Chief Justice TINDAL.—It is impossible to give to this declaration a reasonable intendment without holding that the covenant by the defendants in the deed therein in part set out, whereby they engage to pay or cause to be paid to Sims and the plaintiffs the said sum of 1400*l.* at the time and in manner thereinbefore appointed for payment of the same, refers to the time mentioned in the proviso. It is like the case of a lease containing a reddendum for the payment of rent on particular days, and a covenant to pay the rent at the times thereinbefore

thereinbefore mentioned and appointed, could only apply to the day named in the proviso before set out; that, as to interest, the breach was complete before the mention of interest—the addition that the defendants had not paid any interest, which would be recoverable from the appointed day by the 3 & 4 Will. 4, c. 42, s. 28,

was mere surplusage; that, if it was a part of the breach, or substantial allegation of damage founded thereon, and objectionable, the demurrer should have been confined to it, it was no cause of demurrer to the whole declaration—*Duffield v. Scott*, 3 Term Rep. 374—*Amory v. Brodrick*, 5 Barn. & Ald. 712.

mentioned. Indeed, this case is stronger, for one time of payment only is mentioned.—With respect to the second objection—the breach appears to me to be alleged in the terms of the covenant. The allegation as to the non-payment of interest is immaterial, and may be rejected: and the case of *Eaton v. Bell* (*b*) is an express authority, that, upon a contract like this, interest may be recovered as damages, although not alleged in the declaration.

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Mr. Justice PARK.—The case of *Amory v. Brodrick* (*c*) is in point to shew that the statement as to interest in the breach may be rejected as surplusage.

Mr. Justice GASLEE.—It has never been disputed that interest is recoverable by way of damages in a case like the present. The cases of *Duffield v. Scott* (*d*) and *Amory v. Brodrick* are conclusive authorities that the superfluous claim of interest in the breach will not vitiate the whole declaration.

Mr. Justice VAUGHAN concurred.

Judgment for the defendants.

(*b*) 5 Barn. & Ald. 34. & Ald. 712, 2 Chit. Rep. 329.

(*c*) 1 Dow. & Ryl. 361, 5 Barn. (*d*) 3 Term Rep. 374.

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A patent was granted to the plaintiff for certain machinery in the year 1824. In March, 1832, the Vice Chancellor made an order for the trial of the plaintiff's right in an action in this Court. A verdict in that action being found for the plaintiff, and a rule nisi having been granted for entering a nonsuit or for a new trial, on the ground of the supposed invalidity of the patent by reason of an insufficient specification, and that rule being ready for argument, the defendant obtained a scire facias to repeal the patent. The Court refused to postpone the discussion upon the rule, until after the decision of the Court of King's Bench upon the scire facias.

HAWORTH v. HARDCASTLE.

THIS was an action on the case for an alleged invasion by the defendant of the plaintiff's patent, obtained for an application of certain machinery or apparatus adapted to facilitate the operation of drying calicoes, linens, muslins, or other similar fabrics. The cause was tried before Mr. Justice Alderson at the Sittings in London after last Michaelmas Term, when a verdict was found for the plaintiff. In Hilary Term, a rule nisi was obtained on the part of the defendant to set aside the verdict and enter a nonsuit, or for a new trial. This rule came on to be argued on a former day in this term, but was postponed for the accommodation of counsel. And, on Saturday, the 3rd instant—

Mr. Serjeant Stephen obtained a rule nisi to enlarge the rule for entering a nonsuit till the first day of Trinity Term, on an affidavit which stated, that the fiat of the Attorney-General had been obtained for a writ of scire facias to repeal the patent on which the action was founded; that a writ of scire facias had been issued thereupon, lodged, and returned; that a bond with sufficient sureties in the penal sum of 500*l.*, conditioned for the due prosecution of the said writ and the proceedings thereupon, and for payment of the costs of the defence in case of a failure, had been prepared by the proper officer; that the proceedings had been adopted and taken after much consideration, and on the advice of counsel; that it was the full and bona fide intention of the party prosecuting the same [the defendant in the action] to proceed to the trial thereon with all despatch; and that the said proceeding was not intended for delay or vexation. The scire facias had not been served.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge* now shewed cause.—The order of the Vice Chancellor in pursuance of which this case was tried bears date on the 1st of March, 1832. The patent was granted in 1824, and consequently has now but a short time to run. Under these circumstances, the Court, in the exercise of their discretion, will be fully warranted in refusing to interfere.

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Mr. Serjeant *Stephen*, in support of his rule.—This is undoubtedly an application to the discretion of the Court. Whether or not the patent in question be valid, is a question in which the public is interested, and one which will be considered in a more formal manner on the scire facias; and the same points of law will arise in the discussion on the trial of that writ as on the argument upon the rule for a nonsuit. The proceeding on the scire facias, which is for the benefit of the public, ought not to be prejudiced by a preliminary decision of this Court.

Lord Chief Justice TINDAL.—In the exercise of our discretion, I think we ought not to make this rule absolute. It appears that the patent in question was granted so long ago as the year 1824; and that the order of the Vice Chancellor upon which the present action was brought was made on the 1st of March, 1832, more than two years since. After so long a delay, and coming now at the last moment, when the rule for entering a nonsuit or for a new trial is ripe for argument, I think the application is not one that deserves favour. The plaintiff has in strict justice a right to go on in his action to judgment: and even if the scire facias avail, and the patent be repealed, that will not necessarily prevent us from giving judgment on the objections taken at the trial of this cause.

Mr. Justice PARK.—I think no sufficient ground has been shewn for the interposition of the Court. The ar-

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gument on the rule has been postponed merely for the accommodation of the bar: and the scire facias is not yet served. Notwithstanding the possibility of our judgment in this case being at variance with the judgment of the Court of King's Bench on the trial of the scire facias, that is no ground for delaying the discussion; for, non constat that our judgment is therefore erroneous.

The rest of the Court concurring—

Rule discharged (a).

(a) See the decision upon the rule for a nonsuit, post, Trinity Term.

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April 5th.

The 6th rule of Michaelmas Term, 3 Will. 4, does not prevent a plaintiff from issuing concurrent writs of capias into two or more counties; but there should be an affidavit of debt filed with the filacer of each county.

DUNNE v. HARDING.

A WRIT of capias was issued by the plaintiff against the defendant into Middlesex, tested the 16th of November, 1833, upon an affidavit duly filed with the filacer for that county. On the 7th December, a second capias (also tested on the 16th November) issued into Devonshire upon the same affidavit. The defendant was arrested upon the second writ, and gave a bail-bond. The præcipe for the second writ was as follows:—

“ Devonshire. Capias for George Dunne against Philip Harding. Promises.

“ Rhodes & Beevor,

“ 19, Chancery Lane, London.

“ Oath for 300*l.*, as per affidavit on issuing capias into Middlesex, November 16th, 1833.”

An application was afterwards made to Mr. Justice Park at Chambers to set aside the second writ, and the

bail-bond given by the defendant on his arrest thereon, on the ground that such second writ was irregular, inasmuch as, according to the 6th rule of Michaelmas Term, 3 Will. 4, the second writ should have been an *alias* capias, and not an original writ. That rule provides "that any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county; and any alias or pluries writ of capias may be directed to the sheriff of any other county; the plaintiff in such case, upon the alias or pluries writ of summons, describing the defendant as *late* of the place of which he was described in the first writ of summons, and, upon the alias or pluries writ of capias, referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed." The learned Judge ordered the writ to be set aside. A subsequent application was made to the same learned Judge, praying him to review his former decision, and the case of *Rodwell v. Chapman* (a) was brought under his notice. There, the defendant was arrested on a capias founded upon an affidavit on which a capias had previously issued into another county, upon which nothing was done: and the Court of Exchequer held that the second capias need not be an alias. Upon the authority of that case, the learned Judge made an order directing the first order (for setting aside the writ) to be suspended until the first day of last Hilary Term, and then rescinded unless the defendant applied to the Court to confirm it.

Mr. Serjeant *Talfoord* accordingly obtained a rule nisi to discharge the second order of Mr. Justice Park, and thus confirm the first.

Mr. Serjeant *Wilde* now shewed cause.—The second writ was perfectly regular. It was not an alias issued ac-

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(a) 1 Dowl. P. C. 634, 1 Cromp. & Meeson, 70.

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cording to the directions of the rule referred to: it could not be so; for, the first writ was still running: it was an original writ of capias. The first writ not being returnable when the second issued, the latter could not contain the words requisite to shew it to be an alias writ. *Rodwell v. Chapman* is precisely in point. Before the late rule, a plaintiff might issue as many concurrent writs as he pleased; though the defendant could only be arrested on one of them, and consequently could only be liable for the costs of one: and there is nothing either in the rules or in the statute 2 Will. 4, c. 39, to alter in any respect the practice on the subject.

Mr. Serjeant *Talfoord*, in support of his rule.—Upon the fair construction of the rules of Michaelmas Term, 3 Will. 4, and the forms therein given (*b*), where a capias has issued into one county, and the defendant is not found there, and the plaintiff is desirous of issuing process into another county, it must be by alias. In *Coppin v. Potter* (*c*), Lord Chief Justice Tindal says (*d*): “The chief objection on which it is sought to discharge the defendant from arrest is, that, after a writ has been issued against him into Sussex, upon an affidavit sworn before the deputy filacer for Sussex, who is also the deputy filacer for Cornwall, an alias writ ought not to have been issued into Cornwall without a new affidavit or an office copy of that which has been sworn. But the answer to this objection is, that, by the rule of Court founded on the recent statute, the alias writ takes the place of the testatum, *and, when issued into another county, there can be no other.*” Here, the plaintiff should have called upon the sheriff to return the first writ before the second was issued; and the second should have been framed in conformity with the

(*b*) *Ante*, Vol. 2, pp. 330 et seq. (*c*) *Ante*, p. 272; 10 Bing. 441.
 (*d*) 10 Bing. 444.

rule of Court above referred to; it must have reference to the first. Supposing it be regular to issue concurrent writs into different counties, there should at all events be an affidavit filed in the second county; otherwise the defendant cannot know where to search for the information requisite to enable him to put in bail.

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Lord Chief Justice TINDAL.—The difficulty suggested as to the affidavit does not arise in this case: that is a difficulty that may be obviated by filing an affidavit with the filer for each county into which the process issues. The only question is, whether or not there may be two or more concurrent writs at the same time issued into several counties. No reason occurs to my mind why such should not be the practice. Before the passing of the statute 2 Will. 4, c. 39, concurrent writs were allowed; and it would be unreasonable if it were otherwise now; for, if the defendant's abode were uncertain, and the plaintiff could only issue one writ at a time, and be obliged to wait the return of that writ before another could be sued out, the defendant might remove from county to county, and thus altogether elude the process of the Court. On the other hand, the defendant will suffer no real inconvenience in having several writs issued against him at the same time into different counties; for, he can only be arrested once, and is chargeable only with the costs of the writ upon which he is actually arrested. But it is said, that, by the 6th rule of Michaelmas Term, 3 Will. 4, a mode is pointed out in which alone since the passing of the statute above referred to a second writ can issue. That rule provides "that any alias or pluries writ of capias may be directed to the sheriff of any other county; the plaintiff in such case upon the alias or pluries writ of capias referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed." And it is thence inferred that the plain-

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tiff is bound in the second writ to refer to the first. Undoubtedly that is so where the second writ is an alias; but here it was a second original capias, quite independent of and distinct from that which had before issued into Middlesex. The plaintiff was clearly not bound to await the return of the first writ before he issued the second. I am unable to distinguish the case of *Rodwell v. Chapman* from the present. There it was held expressly, that, where a defendant is arrested on a capias founded upon an affidavit on which a capias had previously issued into another county, upon which nothing was done, the second capias need not be an alias. The practice before the passing of the Uniformity of Process Act, the reason of the case, and authority, all concur to shew that the second writ in this case was regular: and consequently the rule that has been obtained on the part of the defendant for rescinding the second order of my Brother Park, must be discharged.

Mr. Justice PARK.—When the parties first came before me, the second writ was supposed to be an alias; but, on the subsequent application, the filacer attended, and stated that it was not an alias, but an independent writ; and the case of *Rodwell v. Chapman* was cited: I therefore suspended my former order till an application could be made to the Court; and, in default of the party's applying, ordered it to be rescinded. The case is perfectly free from difficulty. There cannot be an alias until the exigency of the first writ be performed—until it has expired, or the sheriff has made his return. But there can be no objection to the issuing of concurrent writs into several counties; the practice is convenient to the plaintiff, and cannot be detrimental to the defendant, who is only liable to pay the costs of the process upon which he is taken.

Mr. Justice GASELEE.—The only question is, whether the writ in question was a capias or an alias capias: if the former, the rule referred to does not apply.

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Mr. Justice VAUGHAN.—The practice that formerly prevailed on this point is in no respect altered either by the Uniformity of Process Act or by the rules of Court consequent thereon.

Rule discharged.

FLEMING and Four Others v. GOODING.

Monday,
April 5th.

THIS was an action for the use and occupation of certain garden ground at Newington, Surry, tried before Lord Chief Justice Tindal at the Sittings at Westminster after the last Michaelmas Term. The plaintiffs were described in the declaration as trustees of the joint estate of Thomas Brandon and Samuel Brandon, deceased. The agreement under which the defendant was let into possession of the premises was dated the 31st of March, 1832, and entered into between Thomas Fleming and W. B. J. Brandon, acting for and on behalf of the trustees of the joint estate of Thomas Brandon and Samuel Brandon, deceased, and the defendant. The person by whom the agreement was prepared was called as a witness at the trial, and proved that the five persons who were plaintiffs on the record were in March, 1832, the trustees of the joint estate of Thomas and Samuel Brandon, and that Fleming and W.

The defendant entered into possession of premises under an agreement dated the 31st March, 1832, and made with T. F. and W. B. J. B., "acting for and on behalf of the trustees of the joint estate of T. B. and S. B." In an action for use and occupation brought by the five persons who (as proved by parol evidence at the trial) were at the date of the agreement "trustees of the joint estate of T. B. and S.

B," and for whom T. F. and W. B. J. B. were then acting as agents, the plaintiffs gave in evidence two orders in Chancery, dated in 1830 and 1831, by the former of which two of the plaintiffs were named as trustees of T. B., and, by the latter, the other three as trustees of S. B.:—Held, that the action was well brought in the names of the five; and that, notwithstanding the orders produced, the defendant was estopped from disputing the title of those under whom he by executing the agreement acknowledged to hold the premises, for that the title evidenced by those orders was not inconsistent with a different title in the plaintiffs at the date of the agreement.

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B. J. Brandon acted as agents for them. In further proof of their title, the plaintiffs gave in evidence two orders in Chancery, one dated the 26th of August, 1830, the other, the 28th of May, 1831, which shewed that at the time those orders were made two of the plaintiffs were trustees of the estate of Thomas Brandon, and the other three trustees of the estate of Samuel Brandon. A verdict was found for the plaintiffs.

Mr. Serjeant *Taddy*, in Hilary Term last, obtained a rule nisi for entering a nonsuit, on the ground that the action should have been brought in the names only of Fleming and W. B. J. Brandon, the persons by whom the agreement was signed; and that the plaintiffs had by their own evidence negatived their title as set out in the declaration.

Mr. Serjeant *Bompas*, on a former day in this term, shewed cause.—The defendant entered into possession of the premises under an agreement in which the parties with whom he dealt were described as acting on behalf of the trustees of the joint estate of Thomas and Samuel Brandon. The action therefore is properly brought in the names of the trustees; and the defendant is estopped from disputing their title: and it was competent to the plaintiffs to shew, as they did, by parol evidence, that they were the trustees on whose behalf the agreement was made, although they were not named at the time. Though appointed under separate orders in Chancery, the plaintiffs were still trustees of the joint estate.

Mr. Serjeant *Taddy*, in support of his rule.—Undoubtedly, if the names of the five plaintiffs had been inserted in the agreement, the defendant would have been concluded, as he would then have had notice who the parties were to whom he was liable. It may be admitted that it

is not competent to a tenant to contest the title of the landlord under whom he is admitted to possession. But here the plaintiffs have themselves negatived the title alleged in their declaration; for, the documentary evidence produced by them shewed that they were not joint trustees of the estates of Thomas and Samuel Brandon.

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Lord Chief Justice TINDAL.—The question is whether this action for use and occupation is brought in the names of the proper plaintiffs. It appears that, on the 31st of March, 1832, the defendant entered into an agreement with Fleming and W. B. J. Brandon, two of the plaintiffs, for the occupation of the premises in question. In this agreement Fleming and W. B. J. Brandon are described as acting for the five persons who are plaintiffs on this record, trustees of the joint estate of Thomas and Samuel Brandon. The defendant having executed this agreement, on the ordinary principle admits, that, at the time he so executed it, the parties with whom he treated were, as they described themselves, agents for the joint estate of the two Brandons; and it is not competent to him now to say that they were not at that time agents for the trustees of such joint estate. It was proved at the trial, by the person who prepared the agreement, that the five plaintiffs were the persons for whom Fleming and W. B. J. Brandon acted as agents in March, 1832. So far, therefore, the case is in principle the same as that of an agreement entered into by a steward on behalf of the landlord. In such case, an action for use and occupation under the agreement may be brought by the real landlord; and the fact of his being the landlord may be shewn by parol, and the tenant cannot dispute his title. So, here, the defendant having, by executing the agreement of the 31st March, 1832, admitted the parties with whom he dealt to be acting as agents for the five trustees of the joint estate of Thomas and Samuel Brandon, and it being proved that

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the plaintiffs on the record are the persons referred to by that agreement; he is estopped from disputing their title. It is contended, however, that the plaintiffs have themselves proved a title different from that shewn by the agreement and by the declaration—that they have shewn that they were trustees, not of the joint estate of Thomas and Samuel Brandon, but of the latter only. The plaintiffs certainly attempted to prove their actual title; and the documentary evidence offered for this purpose only proved that two of them were trustees of the estate of Thomas, and the other three of that of Samuel Brandon. But that evidence only brought their title down to 1831. It is not inconsistent with that title, which the defendant now urges by way of estoppel, that, at the time the agreement under which the defendant derived possession of the premises was entered into, the plaintiffs' title was as there stated. The failure by the plaintiffs to prove their title does not, however, take this case out of the ordinary rule which prohibits a tenant from calling in question the title of the landlord under whom he has entered.

The rest of the Court concurring—

Rule discharged.

*Wednesday,
 May 7th.*

An application under the 1 Will. 4, c. 22, for the examination of a witness resident out of the jurisdiction of the Court, must be made as early as possible after issue joined.

BRYDGES v. FISHER.

THIS was an action brought by the plaintiff, late a partner with one Macdonald, as army agents, to recover from the defendant, who had been their clerk, a sum of between 2,000*l.* and 3,000*l.* of prize-money, which had been placed under the defendant's control, and for which he was empowered to draw cheques, and which it was alleged he had, in fraudulent concert with Macdonald, applied to the use of the latter, and the plaintiff had been

compelled to replace it. The action was commenced in May, 1833, and issue was joined in Hilary Term last.

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Mr. Serjeant *Adams*, on a former day, obtained a rule nisi for a commission for the examination of Macdonald (*a*), he being resident at St. Omer's, in France.

Mr. Serjeant *Wilde* now shewed cause.—Before they allow a plaintiff to be subjected to the delay and inconvenience of a commission for the examination of an adverse witness, the Court will require it to be shewn that an application has been made without effect to obtain the personal attendance of the party, particularly where the distance is so short, and the means of intercourse so prompt. Besides, the application comes too late: issue was joined in sufficient time to enable the party to apply last term.

Lord Chief Justice *TINDAL*.—I am not disposed to accede to any further postponement of the cause. The commission may go, subject to the chance of its being returned in time for the trial.

Mr. Justice *PARK*.—It is not in all cases necessary that the affidavit upon which a commission for the examination of foreign witnesses is moved for, should allege that applications have been made to the party in order to obtain his personal attendance.

Mr. Justice *VAUGHAN*.—There is always matter for suspicion where a party seeks rather to examine his witness on interrogatories, than to have him examined in Court.

Rule absolute, conditionally (*b*).

(*a*) Under the statute 1 Will. 4, c. 22, which has been held not to be confined to cases where the witnesses reside within the King's dominions—*Duckett v. Williams*,

1 Cromp. & Jervis, 510. But it does not apply to indictments—*Rex v. Briscoe*, 1 Dowl. P. C. 520.

(*b*) In *Spalding v. Mure*, MS. 2 Tidd, 814, 9th edit., the Court

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Wednesday,
May 7th.

Where the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property—The Court refused to reverse the fine, at the instance of the husband, but left him to his common law remedy.

CHEEK, Plaintiff, BOOTLE and Others, Defendants.

MR. Serjeant *Talfoord* moved to reverse a fine as to one of the defendants, under the following circumstances:—The acknowledgment was taken before commissioners in the year 1826, Mary Roberts, one of the defendants, being at the time a married woman, and her husband not concurring. This fact was known to the commissioners at the time of taking her acknowledgment. The premises in respect of which the fine was levied had belonged to one John Grove, the first husband of Mary Roberts, who died seized in fee on the 13th December, 1806—his widow being entitled to dower. In June, 1807, Mary Grove married Roberts; and in the following year they separated, under a deed. No specific mention was made of this property in the deed; but the husband covenanted not to interfere with any of his wife's property. Mrs. Roberts had also become entitled to a moiety of the property under a devise by a deceased daughter by John Grove. The application was made on the part of the husband of Mrs. Roberts.

Lord Chief Justice TINDAL.—No doubt the Court may interfere to reverse a fine as to a party upon whom fraud has been practised. Here, however, the application is made on the part of the husband of Mrs. Roberts, who has by the deed of separation covenanted not to interfere with his wife's property. I therefore think we ought not to assist him, but leave him to his common law remedy, a writ of error.

The rest of the Court concurring—

Rule refused.

of King's Bench (the motion being made on the last day of term) awarded a mandamus for the ex-

amination of witnesses in India, under the 13 Geo. 3, c. 63, s. 44, before issue joined.

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WATSON v. MASKELL.

A VERDICT was found for the plaintiff in this cause for 2007., at the last Spring Assizes for Essex. The defendant died on the 18th of April (the fourth day of the present term). The costs were taxed on the 21st, final judgment signed on the 22nd, and a writ of fieri facias thereon issued on the same day, tested the 15th (being the first day of term), and returnable on the 26th.

Mr. Serjeant Goulburn, on a former day, obtained a rule nisi to set aside the fi. fa. for irregularity, with costs. The irregularity suggested was, the issuing of the fi. fa. after the death of the defendant, without a previous scire facias. The learned Serjeant referred to the 3rd section of the first general rules and regulations of Hilary Term last, which provides that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day."

Mr. Serjeant Wilde shewed cause.—The rule is not addressed to the judgment; and therefore, if the fi. fa. is warranted by the judgment, it is regular, and the application is answered. The statute 2 Will. 4, c. 39, s. 12, merely directs that "every writ issued by authority of that act shall bear date on the day on which the same shall be issued;" and that act applies to writs for the commencement of actions only—*Storr v. Bowles* (a). In *Sutton v. Lord Cardross* (b), where a ca. sa. was issued in the course of Michaelmas Term, 1832, tested in the name but issued after the death of Lord Tenterden, who died in that term, Mr. Justice Patteson, after consulting the other Judges,

The plaintiff obtained a verdict at the Spring Assizes; the defendant died on the 18th April (the fourth day of Easter Term); the costs were taxed on the 21st, final judgment signed on the 22nd, and a fi. fa. issued on the same day, tested on the first day of the term. The Court refused to set aside the fi. fa. for the irregularity in issuing it after the death of the defendant without a sci. fa.—the writ being warranted by the judgment, which the motion did not impeach.

(a) 1 Dowl. P. C. 516.

(b) 1 Dowl. P. C. 511.

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said: "We are of opinion that we ought not to enter into the question as to the exact day on which the writ was issued. If we did, we should destroy the principle of relation which has always obtained in practice, that a writ issued at any time in term has relation to the first day of it." The statute 1 Will. 4, c. 7, s. 3, provides that "every execution issued by virtue of that act shall and may bear teste on the day of issuing thereof." But that provision, as well as that in the 3 & 4 Will. 4, c. 67, s. 2, applies only to writs issued under the authority of those acts, and to judgments signed in vacation. They are not intended to operate in restraint of the suitor, but as affording an indulgence. They effect no alteration in the previous practice as to writs of execution. A scire facias is never required to be issued, unless the fi. fa. appears on the face of it to be tested subsequently to the death of the party. In *Waghorne v. Langmead* (*c*), judgment was signed on the 23rd of May, the defendant died on the 29th, and on the 31st a fi. fa. issued, tested before the death of the defendant; on a motion to set aside the fi. fa., the Court said, "that, to make a scire facias necessary to support the execution, the process must appear to have issued after the death of the party;" and Mr. Justice Buller read a case of *Dakin v. Cartwright* (*d*), where, according to his note of it Lord Chief Justice Lee referred to a case of *Gill v. Parsons* (*e*). There, "judgment was entered between Hilary and Easter Terms, after which the defendant died. Execution was taken out, tested the first day of Hilary Term, and the goods in the hands of the executors were taken. And, on motion, it was holden, that, though a judgment in respect of purchasers binds only from the

(c) 1 Bos. & Pull. 571. And see
Heapy v. Parris, 6 Term Rep. 363.
Bragner v. Langmead, 7 Term Rep. 20.

(d) M. S. 12 Geo. 2. K. B.
(e) M. S. Michaelmas, 13 Will.

signing, yet, as to the party and his representatives, it binds as it did before at common law; and that the execution so tested was therefore regular." So long as the judgment stands, the writ is regular.

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Mr. Serjeant Goulburn, in support of his rule.—This rule undoubtedly will not set aside the judgment: but it is still competent to the party to shew that the judgment upon which the fi. fa. has issued is irregular; which it clearly is, and consequently the fi. fa. must fall. The judgment is in direct contravention of the rule above referred to, of Hilary Term last: and a fi. fa. cannot be supported upon a judgment that is a nullity.

Lord Chief Justice TINDAL.—The plaintiff is by the rule brought here to defend the fi. fa. On the face of the writ there is no irregularity. The complaint should have been addressed to the judgment.

The rest of the Court concurring—

Rule discharged.

**Lysons and Wife, Executrix of GARDINER, deceased,
v. BARROW.**

Wednesday,
May 7th.

THE defendant, at the request of the testator, John Gilbert Cooper Gardiner, in his lifetime, effected a policy

The 31st section
of the 3 & 4
Will. 4, c. 42,
renders execu-
tors or adminis-
trators suing in right of the testator or intestate liable to costs where they are nonsuited or the defendants obtain verdicts, unless the Court or a Judge shall otherwise order:—Semblé, that the Court will otherwise order where there appears to be reasonable or probable cause for suing in the representative character.

The defendant effected a policy of insurance on the life and for the benefit of one G., and, on his death, received the sum insured. The plaintiffs, as executors of G., sought to recover this sum in an action for money had and received by the defendant to their use as executors, and were nonsuited on a ground collateral to the merits of the cause:—The Court ordered the judgment of nonsuit to be entered up without costs, under the statute.

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of insurance upon Gardiner's life, in his (the defendant's) own name : the premiums were paid with the money of Gardiner; and, on his death, the defendant received the sum insured (2,000*l.*) from the insurance office. The plaintiffs, in their representative character, brought this action for money had and received to their use as representing the testator, against the defendant, on his implied contract to pay over the money to them—he having admitted that he himself had no interest in it. The plaintiffs being nonsuited at the trial on a ground dehors the merits—

Mr. Serjeant *Adams* obtained a rule calling on the defendant to shew cause why the judgment of nonsuit should not be entered up without costs, under the 31st section of the statute 3 & 4 Will. 4, c. 42, by which it is enacted, "that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the superior Courts [of common law at Westminster] shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." The motion was founded upon an affidavit stating circumstances to shew that it was the duty of the plaintiffs, as representing the testator, to bring the action; and also that the defendant had frequently declared that he should not defend the action.

Mr. Serjeant *Spankie* shewed cause.—Before the passing of the 3 & 4 Will. 4, c. 42, executors suing for a cause of action accruing to their testator, were not liable to costs,

being excepted out of the statute 23 Hen. 8, c. 15: but it was otherwise where they sued on promises to or for contracts made with themselves. In *Dowbiggen v. Harrison* (a), it was held that an executor nonsuited upon a declaration containing a count on an account stated with the plaintiff as executor, of monies due to him as executor, was liable for costs in respect of such count. Mr. Justice James Parke said: "Looking at the words of the statute, instead of stopping at the decided cases, the contract stated in the sixth count was one 'made between the plaintiff and another person,' within the statute of 23 Hen. 8, c. 15. The defendant is entitled, therefore, to costs upon that count in which the plaintiff sues, not on a promise to the intestate, but upon one alleged to have been made to herself." So, in *Jobson v. Forster* (b), where the plaintiff sued as administratrix, upon promises to the intestate, for work and labour, and also on an account stated with the plaintiff as administratrix, concerning money due to the intestate, and a promise to pay her; it was held that it thereby appeared that the contract was made between the plaintiff and another person within the words of the statute 23 Hen. 8, c. 15, and therefore that, after a nonsuit, the defendant was entitled to the costs; but, so far as the pleadings were concerned, to the costs of that count only in which the promise was laid to be to the administratrix. Here, the plaintiffs did not sue in right of the testator, for, the defendant's liability could only arise after the testator's death: if therefore the plaintiffs were entitled at all, it could only be as for money had and received to *their* use. The promise is alleged to be to the plaintiffs, as in the two cases cited. The statute 3 & 4 Will. 4, c. 42, s. 31, was intended to extend, and not to limit the liability already in this respect imposed by the law upon

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(a) 4 Man. & Ryl. 622, 9 Barn. & Cress. 666.

(b) 1 Barn. & Adolph. 6.

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executors and administrators; and, therefore the Court will not, in the exercise of the discretionary power reposed in them by the legislature, exempt parties from costs in cases where, before the passing of the act, they would clearly have been liable to costs. In the present case, it is perfectly immaterial how the money got into the hands of the defendant: the only question is, with whom was the contract made upon which the plaintiffs have declared.

Mr. Serjeant *Wilde* and Mr. Serjeant *Adams*, in support of the rule.—The plaintiffs were nonsuited merely because they were not prepared to shew the agency of the defendant in effecting the insurance. The contract in question was one upon which the plaintiffs could sue only in their representative character: if they did not sue as executors, they had no right to sue at all. This distinguishes the case from *Dowbiggen v. Harrison* and *Jobson v. Forster*. From the very nature of the case the promise could only be a promise after the death of the testator; for, until that event took place, the defendant could not have received the money: and, if the plaintiffs had recovered, the amount of the verdict would have been assets of the testator. If the Court be satisfied that the action is properly brought by the plaintiffs in their representative character, and there is reasonable cause for bringing it, the case is precisely one in which they will be well warranted in withholding costs from the defendant.

This action was commenced before the passing of the statute, though the nonsuit took place after; the statute, therefore, does not apply, as it could not have been intended to operate retrospectively (c).

Cur. adv. vult.

(c) This point is now sub judice in a case of *Quelle v. Boucher*, in which a rule nisi was granted on the last day of Trinity Term, 4 Will. 4.

Mr. Justice PARK now delivered the opinion of the Court:—

This case came on before the Court on Saturday last, in the absence of the Lord Chief Justice, upon a rule calling on the defendant to shew cause why the judgment of nonsuit in this cause should not be entered up without costs. The question will turn almost entirely upon a clause in one of the new statutes, viz. the 3 & 4 Will. 4, c. 42, s. 31, by which it is enacted, “that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the Court in which such action is brought, or a Judge of any of the superior Courts, shall otherwise order,* be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.” The plaintiffs in this case having been nonsuited, it is quite clear, that, if the Court shall not otherwise order, the defendant will be entitled to his costs. The question then is, will the Court interfere in this case. My Brothers Gaselee and Vaughan and myself are clearly of opinion that this is a case in which the Court is properly called upon to order the nonsuit without payment of costs, in the manner which the rule prays. The clause of the act which I have read has made undoubtedly a great alteration in the situation of plaintiffs executors or administrators; and perhaps a beneficial alteration for the public, in preventing a number of frivolous and vexatious actions from being brought: for, as the general rule exempted executors or administrators from payment of costs when they were nonsuited or had a verdict against them where the action was brought upon a contract entered into by the testator or intestate, or for a wrong done in

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his lifetime, many vexatious and unfounded actions were brought, and the plaintiff escaped from the payment of costs. It is true, that, even by that law, where an action was brought, though the plaintiff was suing as executor or administrator, he was not excused from payment of costs on a wrong done in his own time, or on a contract made with himself. It is, clear, then, that merely saying he the plaintiff sued as executor or administrator, was not sufficient, where it appeared to be his own contract. In this case, the declaration states that the defendant received the money for the use of the plaintiffs themselves; and the learned counsel for the defendant contends that the present plaintiffs do not sue in right of their testator; that the contract is with themselves; and that therefore, by the old law, they, having been nonsuited, would be liable to costs. And, in support of his contention, he quoted the cases of *Dowbiggen v. Harrison* (*d*), and *Jobson v. Forster* (*e*). But we think the present case is very distinguishable from those cited; and that our decision will in no respect break in upon those judgments. We are of opinion, then, that, by the old law, it is most apparent that the plaintiffs could have sued in no other way; and that, if they had not sued as executors, they had no locus standi in Court, more than the most indifferent person. What are the circumstances of this case? The testator had desired the defendant to effect a policy of insurance for him upon his own life, which the defendant did *in his own name*. Till Mr. Gardiner died, therefore, no money was due from the insurance office, and Mr. Barrow owed the testator nothing. But, upon his death, the defendant, in whose name the policy was effected, received 2,000*l.*, and he was the only person to whom the office would pay; and then an implied contract took place, to

(*d*) 9 Barn. & Cress. 666, 4 Man. & Ryl. 622.(*e*) 1 Barn. & Adolph. 6.

pay to the executors of the testator that money which the defendant has admitted he received, and to the possession of which he had no right. The plaintiffs could only sue in their representative character; for, no contract was made with them individually, but only as representing the testator. Still, the new statute would impose costs, if the Court should not interpose. We are of opinion that the plaintiffs ought not to pay costs. One main point to consider is, was this a frivolous action. So far from it, that it appears from the affidavit that it was the bounden duty of the plaintiffs to the estate of the testator to bring an action. The defendant claimed no interest in the matter, and frequently declared he should not defend the cause. The plaintiffs were defeated upon a ground which they could not be supposed to apprehend. The promise could only, from the nature of the case, be a promise *after* the death of the testator: but still, if a verdict had been obtained by the plaintiffs, the fruit of the verdict would have been the testator's assets. The action could only be brought by the plaintiffs in their representative character; for, in their individual state, they had no more right to sustain an action than the greatest stranger. Therefore, though the statute 3 & 4 Will. 4, c. 42, s. 31, gives costs against executors who fail in their actions; yet, if it shall appear to the Court proper to make exceptions to the generality of the enactment, they may do so where there is a reasonable or probable cause for bringing the action as executors or administrators; otherwise we should not find in the clause the important words "unless the Court in which such action is brought, or a Judge of any of the superior Courts, shall otherwise order." We see by the affidavits that this matter has been twice before Mr. Baron Alderson; and he was clearly of opinion that in this case the plaintiffs ought to be exempted from costs, but, the statute having only passed late in the last year, he wished it to be done in Court.

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For the reasons that have been given, my Brothers Gaselee and Vaughan and myself think that this rule should be made absolute.

Rule absolute.

*Thursday,
 May 8th.*

Where a rule for striking an attorney off the roll for misconduct is referred to the Prothonotary, he is not to be confined to the affidavits already before the Court, but may receive any evidence tending to the elucidation of the matter.

DICAS, Gent., one &c. v. WARNE.

IN Michaelmas Term last, a rule was obtained by Mr. Serjeant *Wilde* on the part of the plaintiff, calling on the defendant's attorney to shew cause why he should not be struck off the roll of attorneys, for having hired or caused to be hired sham bail in error. In the following term, Mr. Serjeant *Jones* appeared to shew cause against the rule. The Court directed the matter to be investigated before one of the Prothonotaries. The parties accordingly attended before Mr. Prothonotary Ray, who now reported that the attorney had answered all the charges brought against him.

Mr. Serjeant *Wilde* moved that the matter might be referred back to the Prothonotary, with directions that he should take into his consideration certain additional affidavits that had been tendered to him on the hearing, and rejected by him on the ground that they were not before the Court when the matter was referred to him.

Mr. Justice PARK.—The Prothonotary must go into the investigation again. In such a case all affidavits tending to explain the matter should be received.

Mr. Justice GASELEE.—The object of sending the case to the Prothonotary was, that it might receive a fuller and more minute criticism than it could have in open Court.

I have always understood the practice to be, that, in a case of this description, the officer may receive any thing that tends to elucidate and further the inquiry: he may even examine the parties personally.

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Referred back to Mr. Ray.

*Tuesday,
June 10th.*

ON Tuesday the 10th of June, in Trinity Term, Mr. Prothonotary Ray made his further report, stating, that, having taken into consideration the whole of the evidence on both sides, he was of opinion, that, although it did not appear that the attorney did himself actually hire or cause to be hired the bail in question, yet enough appeared to shew that he must have been aware that the bail put in were hired bail.

Lord Chief Justice TINDAL.—The report of our officer affixes on the attorney a certain degree of criminality, though undoubtedly of a much lighter character than that with which he was charged. Upon the whole it seems to the Court that the justice of the case will be attained by making the attorney who has so misconducted himself pay all the costs of and occasioned by these proceedings; and, on these terms, the rule may be discharged.

On a reference to the Prothonotary of a rule for striking an attorney off the roll, on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired:— The Court discharged the rule on the terms of the attorney paying all the costs of and occasioned by the proceedings.

Rule discharged accordingly.

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Thursday,
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The Court cannot allow part of a sum paid into Court in lieu of special bail, to be appropriated to the purposes of a plea of tender—the 3rd section of the 7 & 8 Geo. 4, c. 71, expressly pointing out the only mode in which money so deposited can during the progress of the cause be released, viz. by putting in and perfecting special bail.

STULTZ v. HENAGE.

THE defendant being arrested for 163*l*. 4*s*. 6*d*., paid that sum into Court in lieu of bail, together with 20*l*. as a security for the costs of the action, pursuant to the 2nd section of the statute 7 & 8 Geo. 4, c. 71. He now proposed to plead a tender of 100*l*., and accordingly, instead of paying that additional sum into Court—

Mr. Serjeant *Spankie* obtained a rule calling on the plaintiff to shew cause why 100*l*., part of the sum deposited in lieu of bail and costs, should not be appropriated to the tender.

Mr. Serjeant *Wilde*, contra, submitted, that, the defendant having availed himself of the power given by the statute in paying money into Court for a specific object, the Court could not remit to him any portion of the price of the boon afforded him by the statute in any other manner than that provided therein.

Mr. Serjeant *Spankie*, in support of the rule.—Substantial justice will be done by making this rule absolute: for, on the one hand, the plaintiff will be in a better situation, inasmuch as he may if he choose take the 100*l*. out of Court immediately; and, on the other hand, it will operate a great hardship on the defendant, if he be compelled on the plea of tender to pay in 100*l*. in addition to the sum already deposited, and which is a full security to the plaintiff.

Lord Chief Justice TINDAL.—The only question is whether we have any authority under the act to accede to this novel application. I am of opinion that we have not. The 7 & 8 Geo. 4, c. 71, is the first act that allowed money to

be paid into Court in lieu of special bail—the former act, the 43 Geo. 3, c. 46, only authorizing the party, in place of giving a bail-bond, to deposit in the hands of the sheriff the sum indorsed on the writ, and 10*l.* to answer the costs. The 7 & 8 Geo. 4, c. 71, s. 2, requires the sum indorsed on the writ to be deposited in Court, together with 20*l.* as a security for the costs, where the party does not choose to put in and perfect special bail. The sum so deposited is by that section directed “to remain in the Court to abide the event of the suit.” We must therefore see how the plaintiff would stand if the defendant had put in special bail, and also paid in money on a plea of tender. In that case it is clear that the plaintiff would have the security of the money tendered as well as of the bail: and therefore, if we were to accede to this application, we should materially diminish the plaintiff’s security. An additional reason for not granting it is, that the 3rd section of the act points out the mode in which alone money paid into Court under the 2nd section can be withdrawn: it enacts “that it shall and may be lawful for the said defendant who hath made his election to make such deposit and payment as aforesaid, at any time in the progress of the cause, before issue joined in law or fact, or final or interlocutory judgment signed, to receive the same out of Court, by order of the said Court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the Court shall direct.” Pursuing the course pointed out by that clause, the money is withdrawn without in any degree diminishing in point of law the security of the plaintiff. It therefore seems to me that we should not be following out the intention of the act in doing that which is prayed.

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Mr. Justice PARK.—The 3rd section of the 7 & 8 Geo. 4, c. 71, is decisive. The Court has no discretion in the matter. The only way in which the deposit can be set free

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during the progress of the cause, is there specifically and clearly indicated.

Mr. Justice GASELEE concurred.

Mr. Justice VAUGHAN.—This is an indirect mode whereby the plaintiff seeks to withdraw from Court a portion of the sum deposited, without complying with the condition to which the deposit is subjected.

Rule discharged.

*Thursday,
May 8th.*

In an action on the case in the nature of waste brought against eighteen defendants, one of them suffered judgment by default, and at the trial a verdict was found for all the others:— Held, that they were entitled to their costs, under the 4 Jac. 1, c. 3.

PRICE v. HARRIS and Seventeen Others.

THIS was an action on the case brought against the defendant Harris and seventeen other persons, for an injury in the nature of waste done to the plaintiff's reversion. Two of the defendants, viz. Newbury and Proctor, put in no plea; all the other defendants pleaded the general issue, and five of them also pleaded specially. The plaintiff joined issue on the pleas, entered a nolle prosequi as to Newbury, and signed judgment by default against Proctor. The jury found a verdict for all the defendants except Proctor, against whom they assessed damages.

The Court, being dissatisfied with the verdict in favour of Harris, directed a new trial to take place as against him (a); upon the terms of the plaintiff paying the costs of all the defendants (except Proctor, who had suffered judgment by default) as if upon a nonsuit, and entering a nolle prosequi as to all the defendants except Harris and Proctor.

(a) Harris subsequently became insolvent, and Proctor was so likewise; therefore no further proceedings were taken by the plaintiff.

Mr. Serjeant *Atcherley*, on a former day, obtained a rule nisi to amend the postea, the plaintiff having caused it to be drawn up as if Proctor who had suffered judgment by default had pleaded; the effect of which would be, as the learned Serjeant submitted, to deprive the defendants who pleaded, and were all acquitted, of their costs.

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Mr. Serjeant *Wilde* now shewed cause.—The question is, whether the seventeen defendants who obtained a verdict upon the first trial are entitled to costs.—The statute 4 Jac. 1, c. 3, applies only to a case where the plaintiff has wholly failed: otherwise the statute 8 & 9 Will. 3, c. 11, would have been quite unnecessary. In *Murray v. Nicholls* (b), where one of several defendants in an action on the case for a malicious prosecution was acquitted, and a verdict was entered for him accordingly, it was held that he was not entitled to costs under the last-mentioned statute. Lord Chief Justice Tindal there said: “The rule of construction applicable to this statute cannot be laid down with greater accuracy than by Lord Hardwicke in the case of *Dibben v. Cooke* (c), where, after consideration by the Court, his Lordship, in delivering their opinion, said—‘The act extends to trespass, assault, false imprisonment, and ejectment. The present action is a trespass on the case; and though that be a species of trespass, and, in the case of the statute of limitations, the word trespass in the proviso has been extended to actions on the case, yet, considering these acts giving costs have always been looked on as penal acts, not to be extended by equity, and therefore an avowant not within the word plaintiff (d), we must take it only to mean the general sort of trespass vi et armis (e).’” [Mr. Justice *Gaselee*.—*Murray v. Ni-*

(b) 4 Moore & Payne, 280.

(c) *Marshalsea* case, 10 Rep.

(d) *Carthew*, 179.

68 b.

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cholls would have been in point, if the plaintiff here had obtained a *verdict* against one of the defendants: I take it the defendants would not then have mooted the question. Lord Chief Justice *Tindal*.—*Shrubb v. Barrett* (*f*) seems to me to be precisely this case. There it was held, that, if there be two defendants in an action of *assumpsit*, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is entitled to his costs.] There is an obvious distinction between that case and the present: the action was upon a joint contract; the verdict for the one defendant destroyed the right of action; and therefore the plaintiff totally failed.

Mr. Serjeant *Atcherley*, in support of his rule.—Upon the statute 8 & 9 Will. 3, c. 11, and the authorities as to the construction of that act, it is clear that an action on the case is not within that statute; and that, if in this case the plaintiff had obtained a verdict against one or more of the defendants, the case would have been decided by that act. But such is not the fact; for, here, the verdict has passed against the plaintiff as to all the defendants with whom the issue was joined: the plaintiff has a mere assessment of damages against Proctor, who suffered judgment by default. The statute 23 Hen. 8, c. 15, first gives costs to the defendant in certain cases where he obtains a verdict or the plaintiff is nonsuited. The provisions of that act are by the 4 Jac. 1, c. 3, extended to all personal actions. The object of that act was, to put defendants on the same footing as to costs, where they were successful, as plaintiffs before stood on. Here, the trial was between the plaintiff and those defendants who had pleaded; and all the latter obtained a verdict (*g*). The defendants, therefore, are clearly entitled to costs.

(*f*) 2 H. Black. 28.

(*g*) See *Tidd's Practice*, 9th edit. pp. 976 to 987.

Lord Chief Justice TINDAL.—I take the postea in this case to stand as if there had been judgment by default against one of the defendants, and a verdict in favour of all the others. Assuming that to be so, it appears to me that the defendants who have obtained the verdict are entitled to their costs. This case does not come within the 8 & 9 Will. 3, c. 11; there is authority enough to shew that that statute does not extend to actions on the case: we must therefore look to the prior acts giving costs to successful defendants. It is well known, that, before the statute 23 Hen. 8, c. 15, no defendant was in any case entitled to costs. That act (*b*) gave costs in certain cases;

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PRICE
v.
HARRIS.

(*b*) Which enacts, "that, if any person or persons commence or sue in any Court of record, or elsewhere in any other Court, any action, bill, or plaint of trespass upon the statute of King Richard the Second, made in the fifth year of his reign, for entries into lands and tenements where none entry is given by the law, or any action, bill, or plaint of debt, or covenants upon any specialty made to the plaintiff or plaintiffs, or upon any contract supposed to be made between the plaintiff or plaintiffs and any other person or persons, or any action, bill, or plaint of detinue of any goods and chattels whereof the plaintiff or plaintiffs shall suppose that the property belongeth to them or to any of them, or any action, bill, or plaint of account in which the plaintiff or plaintiffs shall suppose the defendant or defendants to be their bailiff or bailiffs, receiver or receivers of their manor mese money or goods to yield ac-

count, or any action, bill, or plaint upon the case, or upon any statute, for any offence or wrong personal immediately supposed to be done to the plaintiff or plaintiffs, and the plaintiff or plaintiffs in any such kind of action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited, or that any verdict happen to pass by lawful trial against the plaintiff or plaintiffs in any such action, bill, or plaint, that then the defendant or defendants in every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff or plaintiffs, and that to be assessed and taxed by the discretion of the Judge or Judges of the Court where any such action, bill, or plaint shall be commenced, sued, or taken; and also that every defendant in such action, bill, or plaint, shall have such process and execution for the recovery and having of his costs against the plaintiff or plaintiffs

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but it was afterwards thought that it did not go far enough; and therefore the 4 Jac. 1, c. 3, s. 2, extended the provision of the former act to all cases of personal actions. It is material to see what are the words of this enactment. They are, "that, if any person or persons shall commence or sue in any Court of record, or in any other Court, any action, bill, or plaint of trespass or ejectione firmæ, or any other action whatsoever wherein the plaintiff or defendant might have costs if in case judgment should be given for him, and the plaintiff or plaintiffs, defendant or defendants, in any such action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited, or that any verdict happen to pass by any lawful trial against the plaintiff or plaintiffs, defendant or defendants in any such action, bill, or plaint, that then the defendant and defendants in every such action, bill, or plaint shall have judgment to recover his costs against every such plaintiff and plaintiffs, defendant and defendants, to be assessed, taxed, and levied in manner and form as costs in the said recited actions are to be assessed, taxed, and levied in and by the said law of the 23 Hen. 8." The question therefore is, whether this statute applies to a case like the present, where there is a judgment by default recorded against one defendant, and a verdict for all the others on a plea of not guilty. The statute provides for two cases—one, where the plaintiff is nonsuited after appearance of the defendant or defendants—the other, where at the trial a verdict passes against the plaintiff. Now, I take it to be clear, that, in an action like this, where some of the defendants suffer judgment by default, and others plead, those who plead alone go to trial, and may call the defen-

as the same plaintiff or plaintiff should or might have had against the defendant or defendants in case that judgment had been given

for the part of the same plaintiff or plaintiffs in any such action, bill, or plaint."

dant if he do not appear. In that case the defendants would be entitled to costs. There can be no reason why, where the verdict is in favour of all those persons who could have a verdict, the case should not be the same: and there could be no verdict except as to those against whom the plaintiff went to issue. It was not essentially necessary that any mention should be made in the award of venire of the defendant who had suffered judgment by default; it is only for the convenience of the Court, that there may be but one taxation of damages. The case of *Day v. Hanks* (i), though it does not expressly apply here, goes the full length of holding the construction we now put upon the act to be a correct one. It was there held, that, if there be two distinct causes of action in two counts, and, as to one, the defendant suffers judgment to go by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. And, though it was urged that there would thus be inconsistent judgments as to the costs, the Court held that to be no objection, and said—"There will be no incongruity in this case on the record. If the Court see two separate causes of action on the same record, on one of which the plaintiff succeeds, and the other is found for the defendant, they are bound to give two distinct judgments. So, in an action for an assault and battery against two defendants, if one suffer judgment by default, and the other justify and obtain a verdict, there must be two separate judgments on the record. Here, the plaintiff will have judgment up to the whole extent to which he is entitled, by having judgment for his costs on the first count, as to which the defendant made default: and, as to the other count, which contains a separate cause of action, and which has been found for the defendant, he

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PRICE
v.
HARRIS.

(i) 3 Term Rep. 654.

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HARRIS.

is equally entitled to have judgment for his costs incurred by the trial of that issue." It therefore seems to me, that, there having been a verdict against the plaintiff as to all those as to whom there could by possibility be a verdict, the present case falls within the reasonable construction of the 4 Jac. 1, c. 3.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—I have always considered the case of *Day v. Hanks* a leading authority. Here are in effect two causes of action. For the convenience of the Court, and that there may be but one taxation of damages, the default of the one defendant appears upon the Nisi Prius record. The oath administered to the jury is, that they shall well and truly try the issue joined between the plaintiff and the defendants who have pleaded to issue, and also assess the damages against the defendant who has allowed judgment to go by default. There will be no inconsistency on the record: there will be a complete judgment for the plaintiff by the assessment of damages for him against the one defendant; and a distinct judgment for the others for their costs.

Mr. Justice VAUGHAN.—Upon the true construction of the statute 4 Jac. 1, c. 3, it appears to me that this case falls within it—that a verdict has passed against the plaintiff by lawful trial.

Rule absolute.

1834.

KIRBY v. SIGGERS.

Thursday,
May 8th.

A WRIT of summons had issued out of this Court by the plaintiff against the defendant, but not served; and another writ, a week afterwards, issued out of the Court of Exchequer between the same parties, for the same cause, the plaintiff electing to abandon the first writ. The defendant pleaded to the action in the Exchequer, another action pending in this Court for the same cause. The plaintiff replied nul tiel record, and served the defendant with a rule to produce the record. The first writ never having been filed, there was no record in existence, and therefore the defendant, by the advice (as he alleged) of the officer of the Court, made up a fictitious roll from the præcipe, and passed it regularly.

Mr. Serjeant *Wilde*, on a former day, obtained a rule nisi that the roll so passed might be cancelled, with costs.

Mr. Serjeant *Stephen* shewed cause.—He submitted that the course the defendant had adopted was the only one that under the circumstances was open to him; and cited *Whitmore v. Rook* (a), where Mr. Justice Denison suggests that “if the writ be lost, an award of it may be entered on a roll.”

Mr. Serjeant *Wilde*, in support of his rule.—The only proper course for the defendant to pursue, would have been to obtain time to plead to the declaration in the Exchequer, to enable him to apply to this Court to cause the writ here to be filed if the circumstances would warrant it.

(a) 1 Lord Ken. 345.

The plaintiff issued two writs, one out of this Court, which was never served, the other out of the Exchequer, on which he proceeded to declare. The defendant pleaded to the action in the Exchequer, another action pending for the same cause in this Court. The plaintiff replied nul tiel record, and served the defendant with a rule to produce. The defendant made up a roll from the præcipe on the file of this Court:—The Court ordered it to be cancelled, with costs.

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—
KIRBY
v.
SIEGERS,

The plaintiff had a right to abandon the first writ: it was never served, nor was any appearance entered to it.

Lord Chief Justice TINDAL.—The defendant's attorney has been guilty of a very great irregularity in tampering with the records of the Court. I know of no instance in which a defendant is allowed to enter on record any of the plaintiff's proceedings. Besides it was quite unnecessary in this case to do any thing of the kind: the defendant might have applied to the Court, and he would have obtained redress if he were aggrieved by the conduct of the plaintiff. The rule must be made absolute with costs.

Mr. Justice PARK and **Mr. Justice GASELEE** concurred.

Mr. Justice VAUGHAN.—Making this rule absolute with costs will operate as a caution to the officer of the Court, not to allow any person in future to interfere improperly with the rolls of the Court.

Rule absolute, with costs.

END OF EASTER TERM.

MEMORANDA.

ON Friday the 25th of April, in this Term, the following warrant was read by the officer of the Court, and ordered to be entered of record :—

WILLIAM, R.

WHEREAS it hath been represented to us that it would tend to the general dispatch of the business now pending in our several Courts of common law at Westminster, if the right of counsel to practice, plead, and be heard, extended equally to all the said Courts ; but such object cannot be effected so long as the Serjeants at law have the exclusive privilege of practising, pleading, and audience, during term time, in our Court of Common Pleas at Westminster : We do therefore hereby order and direct that the right of practising, pleading, and audience in our said Court of Common Pleas during term time shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised exclusively by the Serjeants at law ; and that, upon and from that day, our counsel learned in the law, and all other barristers at law, shall and may, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the said Court of Common Pleas at Westminster, with the Serjeants at law : And we do hereby will and require you to signify to Sir Nicolas Conyngham Tindal, knight, our Chief Justice, and his companions, Justices of our said Court of Common Pleas, this our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this our purpose into effect. And whereas we are

Warrant for allowing barristers to practise in this Court, in banc.

1834.

MEMORANDA.

graciously pleased, as a mark of our royal favour, to confer upon the Serjeants at law hereinafter named, being serjeants at this present time in actual practice in our said Court of Common Pleas, some permanent rank and place in all our Courts of law and equity, we do hereby further order and direct that Vitruvius Lawes, Thomas D'Oyley, Thomas Peake, William St. Julian Arabin, John Adams, Thomas Andrews, Henry Storks, Ebenezer Ludlow, John Scriven, Henry John Stephen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John Taylor Coleridge, and Thomas Noon Talfourd, Serjeants at law, shall from henceforth, according to their respective seniority amongst themselves, have rank, place, and audience, in all our Courts of law and equity, next after John Balguy, Esq., one of our counsel learned in the law: And we do hereby will and require you not only to cause this our direction to be observed in our Court of Chancery, but also to signify to the Judges of our several other Courts at Westminster that it is our express pleasure that the same course be observed in all our said Courts. Given at our Court of St. James's, this 24th day of April, in the Fourth year of our reign.

"To the Rt. Hon. Henry, Lord Brougham and Vaux,
"Lord High Chancellor of Great Britain."

MOTIONS FROM THE SHERIFF'S COURT.

Practice as to motions for new trials where the cause is tried in the sheriff's Court, or other inferior Courts of record, in pursuance of the 3 & 4 Will. 4, c. 42, ss. 17, 18.

ON Tuesday, the 15th April, Lord Chief Justice Tindal announced that the Judges had come to a resolution, that, upon all motions respecting causes tried before sheriffs or Judges of inferior Courts of record pursuant to the statute 3 & 4 Will. 4, c. 42, ss. 17, 18, the party making the application to the Court above must produce an examined

copy of the notes of the sheriff or his deputy, or of the Judge who tried the cause, together with an affidavit verifying such to be a true copy; and also, in cases where no counsel has been retained to conduct the cause or defence in the Court below, an affidavit setting forth the cause or nature of the application: and that all motions to set aside verdicts obtained in such Courts shall come on for hearing as motions in the ordinary course, and not be set down in the new trial paper.

1834.

MEMORANDA.

ON the last day of last Hilary Term, the Hon. Mr. Baron Bayley resigned his seat as one of the Barons of the Court of Exchequer, and was soon afterwards created a Baronet. He was succeeded by John Williams, Esq., one of his majesty's counsel learned in the law, who, on being called to the degree of Serjeant at law, gave rings with the motto "Tutela legum:" he afterwards received the honour of knighthood.

In the following vacation—

Sir Thomas Denman, Knight, Lord Chief Justice of the Court of King's Bench, was created a peer, by the title of Baron Denman, of Dovedale, in the county of Derby.

Sir John Campbell, Knight, his Majesty's Solicitor-General, was promoted to the office of Attorney-General, vacant by the resignation of Sir William Horne, Knight: and C. C. Pepys, Esq., one of his Majesty's counsel learned in the law, was appointed Solicitor-General, and afterwards received the honour of knighthood.

Mr. Serjeant Jones obtained his Majesty's license to assume the surname of Atcherley, in pursuance of the will of his late maternal uncle.

1834.

MEMORANDA**In Easter Term—**

On the 29th of April, Mr. Justice James Park, and Mr. Justice Alderson were removed, the former from the Court of King's Bench, the latter from the Court of Common Pleas, to the Court of Exchequer; and Mr. Baron Vaughan was removed to the Court of Common Pleas, and Mr. Baron Williams to the Court of King's Bench.

THE Judges who sat in the Court of Common Pleas during the foregoing term (except that, from the 29th April, Mr. Baron Vaughan took the place of Mr. Justice Alderson) were—

Lord Chief Justice TINDAL.
Mr. Justice PARK,
Mr. Justice GASELEE,
and
Mr. Justice ALDERSON.

In the Common Pleas.

TRINITY TERM, 4 WILL. IV.

1834.

Thursday,
May 22nd.

COCKMAN v. HELLYER.

MR. BUTT moved for leave to enter up judgment on a warrant of attorney above one and under ten years old, upon an affidavit that the defendant was alive on the 21st instant, the day preceding the present term. He submitted that the reason for the old practice on the subject requiring the affidavit to state the party to be alive on a day *in term*, viz. that the judgment had relation to the first day of the term, and therefore it was necessary that it should appear that the defendant was then living, no longer existed, since that relation was abolished by the late rule directing "that all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, *whether in term or vacation*, when signed, and shall not have relation to any other day" (a).

Since the rule of Hilary, 2 Will. 4, s. 1, reg. 3, it is not necessary in the affidavit on which the motion to enter up judgment on an old warrant of attorney is made to state that the defendant was alive on a day in term: it suffices if it appear that he was living at the time of signing Judgment.

Fiat (b).

(a) Reg. Gen. Hilary, 4 Will. 4, s. 1, reg. 3.

(b) And see Reg. Gen. Hilary, 2 Will. 4, 73, which provides that "leave to enter up judgment on a warrant of attorney

above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation; and, if ten years old or more, upon a rule to shew cause."

1834.

*Thursday,
May, 22nd.*

The defendant was detained on a pluries capias having a blank left for his place of residence, after a capias and alias describing him as of C. Street.—The writ and proceedings were set aside, although it was sworn that the defendant had quitted C. Street, and had no known place of residence.

ROBERTS v. WEDDERBURNE, Bart.

A WRIT of capias and an alias capias issued against the defendant describing him as of Chesterfield Street, May Fair, in the county of Middlesex: the defendant was afterwards detained upon a pluries capias wherein there was a blank left for his place of residence. On application to Mr. Justice Bosanquet at Chambers, that learned Judge ordered that the writ and proceedings thereon should be set aside for irregularity, on the ground that the writ failed to comply with the form contained in the Schedule (No. 4.) to the 2 Will. 4, c. 39, which requires the residence of the defendant to be described in the process.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi to set aside that order, upon an affidavit stating, that, since the issuing of the capias and alias capias, and before the issuing of the pluries, the defendant had gone to the continent, and had no known place of residence in this country.

Mr. Serjeant *Meredewether* shewed cause (a).—The 1st section of the 2 Will. 4, c. 39, provides, that, in all cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament, &c., the process shall be according to the form contained in the schedule, marked No. 1, and that, in every such writ, and copy thereof, the place and county of the residence or *supposed residence* of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall

(a) He produced an affidavit in which the defendant swore that he had only gone to Dieppe for the benefit of his health, where he remained about six weeks; and that

he had lately resided in Baker Street, where the plaintiff might have communicated with him if he had used due diligence.

be mentioned: and by the 4th section, it is provided, that, in all such actions wherein it shall be intended to arrest and hold any person to special bail, the process shall be by writ of capias *according to the form contained in the said schedule* and marked No. 4; and in that form a blank is left for the insertion of the place of residence of the defendant. There can be no ground for stating the defendant's residence to be unknown, the previous process having described him as of Chesterfield Street; and, notwithstanding the statement contained in the affidavit upon which the rule has been obtained, Chesterfield Street might have been inserted in the pluries capias as the *supposed* residence of the defendant, and then the statute would have been complied with.

1834.
ROBERTS
v.
WEDDERBURN.

Mr. Serjeant *Wilde*, in support of his rule.—The exigency of the act could not in this instance be complied with; for, the plaintiff would not have been justified in inserting as the residence of the defendant a place which he knew him to have quitted, and which therefore had ceased to be either his real or his *supposed* place of residence. Under the circumstances, therefore, the course that has been adopted was the only proper one, viz. leaving a blank, the plaintiff having no means of filling it up.

Cur. adv. vult.

Lord Chief Justice *TINDAL* now delivered the opinion of the Court:—

In this case the defendant has been detained upon a pluries writ of capias, wherein there is a blank left for his place of residence, after a capias and alias had been issued describing the defendant as of Chesterfield St., May Fair, in the county of Middlesex. The question which has been argued before us has been whether the present writ is irregular and ought to be set aside; and it is the opin-

1834.

ROBERTS
S.
WEDDERBURN.

ion of a majority of the Judges that such is the case. The act for uniformity of process enacts, by section 4, that, where it is intended to arrest the defendant, the process shall be by writ of capias according to the form No. 4, contained in the schedule; and, upon reference to that form, it is clearly intended that the residence of the party shall be described both in the writ of capias and in those writs which purport to be a continuance of it. In what manner and to what degree of strictness this description is necessary, will appear by section 1; for, although the enactment in that section relates to writs of summons only, it shews by analogy what was in the intention of the legislature in this respect, viz. "the place or county of the residence or supposed residence of the defendant, or wherein the defendant shall be or shall be supposed to be;" so that it is difficult to conceive any case in which the plaintiff can be at a loss to comply with one of these requisites: at all events that difficulty does not apply to the present case, where the two preceding writs of which this is the continuance had given him a description. Upon the ground that it is much better for the public to adhere in all practicable cases to the strict, close, literal compliance with the forms prescribed by the act, rather than to yield to particular cases of supposed hardship on individuals, where the requisites have not been formally complied with, we think the rule for setting aside Mr. Justice Bosanquet's order must be discharged; and that this writ and the subsequent proceedings must be set aside for irregularity.

Rule absolute.

1834.

WILLIAMS, Demandant, HARRIS, Tenant.

THIS was a writ of intrusion. The demandant having entered a nolle prosequi—

Mr. Serjeant *Mercwether*, on the part of the tenant, obtained a rule nisi that his costs might be taxed under the 8 Eliz. c. 2, s. 2 (a). He cited *Cooper v. Tiffin* (b) to shew that a nolle prosequi is within the act.

(a) By which it is enacted, that, "when and as often as any person and persons shall sue forth or by any means cause or procure to be sued forth of the Court commonly called the King's Bench any of the writs or process before mentioned [latitat or alias and pluries capias] against any person or persons which upon the same writ or writs shall happen to be arrested, or which shall appear upon the return of any of the said writs or process, and shall put in his or their bail or bails to answer such suit as shall be objected against him, according to the common order of the Court; that then and in every such case, if the party or parties at whose suit, means, or procurement, the same writ, writs, or process was obtained or sued forth, do not within three days next after such bail had and taken put into the same Court his or their declaration against the same party or parties against whom such writs or process hath been or shall be sued; or if, after declaration had and put into the same Court, the plaintiff

in such case shall not prosecute the same with effect, but shall willingly and apparently to the same Court suffer his or their said suit to be delayed; or shall, after declaration so had, suffer the same suit to be discontinued, or otherwise shall be nonsuit in the same; that then in every such case the Judges of the said Court for the time being shall by their discretions from time to time as they shall see or perceive any such default to be in the party or parties at whose suit, means, or procurement such writs or process was sued forth, award and adjudge to every such person and persons so arrested, vexed, molested, or troubled by such writs or suit, his and their costs, damages, and charges by any means sustained by occasion of any such writs, process, arrests, or suits taken, sued, or had against him, to be paid by such person or persons that so doth or shall cause or procure any such writs or process to be sued forth, as is aforesaid.

(b) 3 Term Rep. 511.

Friday,
May 26th.
The tenant in
a writ of intru-
sion is not enti-
tled to costs up-
on a nolle pro-
sequi. The sta-
tute 8 Eliz. c. 2,
is confined to
personal actions.

1834.

WILLIAMS
Demandant,
HARRIS
Tenant.

Mr. Serjeant *Stephen* now shewed cause.—This being a real action, no costs can be taxed—*Newman v. Goodman* (*c.*). By the statute of Gloucester, 6 Ed. 1, c. 1, costs are recoverable only in those cases where damages are given—*Pilfold's case* (*d.*); and this is not a case in which the statute of Gloucester gives damages. The case of *Cooper v. Tiffin* was decided on the 23 Hen. 8, c. 15, which relates only to personal actions. So, the title and the preamble of the 8 Eliz. c. 2, shew that that statute also relates only to actions personal; and, as the words would imply, to such actions only as are brought in the King's Bench, though the Courts have since held it not to be so confined.

Mr. Serjeant *Merewether*, in support of his rule.—The question is, whether or not the present case is within the equity of the statute of Elizabeth. The Courts have on various occasions extended its operation to actions that are not within the words of it: and this case is clearly within the mischief pointed out by the preamble, and within the intended remedy.

Lord Chief Justice *TINDAL*.—I am of opinion that this rule must be discharged. The question is, whether in a real action, the defendant having entered a nolle prosequi, the tenant is entitled to costs. The general law is clear that in real actions the tenant is not entitled to costs, because the defendant is not so entitled, except in certain cases in which costs are expressly given by statute; and the present is not one of those cases. Before the 23 Hen. 8, c. 15, the defendant was in no case entitled to costs. That statute only applies to personal actions. But it is said that the 8 Eliz. c. 2, having been held to embrace the case of a

(c) 2 Sir W. Blac. 1098.

(d) 10 Rep. 116. a. And see Booth on Real Actions, p. 74.

nolle prosequi, which is not so strictly warranted by the words of the act, also includes within its equity a case like the present. It seems to me, however, that we should in so holding give a much larger construction to the statute than the cases, which have already gone far enough, will warrant. I am of opinion that the defendant is only entitled to costs in those cases where the plaintiff if he succeeded would be entitled: and, as it is perfectly clear that the defendant can have no costs in this form of action, so I think the tenant in this case is not entitled to costs.

1834.
WILLIAMS
Demandant,
HARRIS
Tenant.

Mr. Justice PARK.—The statute of Elizabeth has been carried much further than, if it came before us now for the first time, I for one should feel inclined to carry it. I think the decisions have gone quite far enough in holding it to apply to other Courts than the Court of King's Bench. From the title and the preamble, it is plain that the act was only intended to apply to personal actions.

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—If the defendant had prosecuted his suit and had failed, the tenant would not have been entitled to costs. I therefore see no reason why we should strain the words of the act to give the tenant costs in a case where the defendant has entered a nolle prosequi.

Rule discharged.

1834.

Monday,
June 2nd.

The defendant paid the debt, and the plaintiff's attorney proceeded with the action to recover costs. The defendant resisted the action on the ground that the plaintiff's attorney was uncertified and therefore not entitled to sue for costs. A verdict having been entered for the plaintiff for nominal damages—the Court stayed the execution.

MEEKIN v. WHALLEY.

THE defendant in this case paid the debt, after process had been served upon him, to the plaintiff, but refused to pay the costs, on the ground, as he alleged, that the person who acted as the plaintiff's attorney was not an attorney of this Court. It appeared that the gentleman in question had formerly been duly admitted and inrolled as an attorney in the Court of King's Bench, and that he had also been admitted in this Court, but not inrolled; that he afterwards omitted to take out his certificate, and therefore ceased to be an attorney; and that he was re-admitted in the Court of King's Bench in the beginning of the year 1833, but not in this Court, and, on the 15th January, 1833, took out a certificate for that year. The writ was sued out on the 6th of December, and the attorney's certificate for the year commencing on the 1st November, 1833, was not taken out until March, 1834.

The Secondary (Mr. E. Griffith) produced the fiat for the admission of the party, which he had found at the office. He stated that it appeared that the fiat had been duly granted, and that the party had taken the oaths and signed the oath roll, but had never taken away his admission, and consequently had not been inrolled (a).

A verdict having been found for the plaintiff with nominal damages, and final judgment having been signed and execution issued for the costs—

Mr. Serjeant Wilde, in the last term, obtained a rule nisi to suspend the execution. He referred to *Paterson v. Powell* (b). There, a cause had been tried and a verdict found for the plaintiff, which was afterwards set aside

(a) For the practice as to the inrolment, vide post, p. 504.

(b) *Ante*, Vol. 3, p. 195.

by the Court on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appearing that the defence had been conducted by an attorney of the Court of King's Bench, acting in the name of one who had for some years ceased to be an attorney of this Court, the Court permitted the plaintiff to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit.

1834.
—
MEERKIN
v.
WHALEY.

Mr. Serjeant *Talfourd* now shewed cause.—The motion is too late, it not having been made until final judgment was signed, the costs taxed, and execution actually issued. Besides, it appears from the defendant's affidavit that he was aware of the objection at the commencement of the suit. In a case not reported the Court of King's Bench refused to stay the proceedings in an action brought after a motion for a criminal information (a case in which they will always interfere), on the ground that the defendant had thought fit to take the chance of a verdict in his favour. In *Patterson v. Powell*, nothing appears to have been said by the Court; and the whole seems to have been matter of consent and arrangement. In *Reader v. Bloom* (c), which is not in any respect distinguishable from the present case, it was held that a plaintiff who has obtained a verdict against a defendant, is entitled to his full costs, although the person who conducted his cause was not an attorney. Inrolment is not essential; the admission is complete without it. A certificate is *prima facie* evidence of the legal right of an attorney to practise. In *Pearse v. Whale* (d), where an attorney was admitted in the Court of King's Bench in 1792, and took out his

(c) 10 J. B. Moore, 261, 3 (d) 7 Dow. & Ryl. 512, 6 Barn. & Cress. 38.
Bing. 9.

1834.

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 MEEKIN
 v.
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certificate and practised regularly till 1814, then discontinued his certificate till 1819, when he again took it out regularly, and practised in this Court—it was held, in an action brought by him in the Court of King's Bench for the costs of defending a suit in this Court, that the production of his certificate was *prima facie* evidence of his having been re-admitted in some Court, and that it lay on the defendant, in answer to the action, to prove that he had not been re-admitted in any Court. [Lord Chief Justice *Tindal*.—The state of facts in the present case appears to be this—at the time of suing out the process, the party was no attorney at all; and even at the time of the trial he was not an attorney of this Court, he never having been re-admitted here after his former default.] This being an application to the discretion of the Court, it is for them to say whether or not they will act with reference to an objection of this sort.

Mr. Serjeant *Wilde*, in support of his rule.—By the 2 Geo. 2, c. 23, s. 5 (e), it is enacted, that no person shall be permitted to act as an attorney, or to sue out any writ or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before or after judgment obtained, in the name or names of any other person or persons, in his Majesty's Court of King's Bench, Common Pleas, or Exchequer, &c., unless such person shall be examined, sworn, admitted, and *inrolled* in manner therein mentioned: and by section 24, it is provided, that, “in case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceeding in any of the Courts of law aforesaid, &c., as an attorney or solicitor, for or in expectation of any gain,

(e) Continued by the 12 Geo. 2, and made perpetual by the 2, c. 13, s. 3, and 22 Geo. 2, c. 46, 30 Geo. 2, c. 19, s. 75.

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fee, or reward, without being admitted and *inrolled* as aforesaid, every such person, for every such offence, shall forfeit and pay 50*l.* to the use of the person who shall prosecute him for the said offence, and is thereby made incapable to maintain or prosecute any action or suit in any Court of law or equity, for any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, suit, or proceeding." And further, by the 37 Geo. 3, c. 90, s. 31, it is provided that every person admitted, sworn, *inrolled*, or registered in any of the said Courts as aforesaid, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name or in the name of any other person in any of the said Courts, by virtue of such admission, entry, enrolment, or register; and the admission, entry, enrolment, or register of such person in any of the said Courts shall be from thenceforth null and void. The case of *Reader v. Bloom* proceeded on the assumption of a fact which is not generally correct, and certainly does not exist in the present case, viz. that suitors usually pay money in advance to their attorneys. The doctrine of that case seems to have been doubted, and its authority shaken, by *Young v. Dowman*(f). There, the plaintiff had discontinued, and, on the taxation of costs, it was objected on the part of the plaintiff that the person acting as attorney for the defendant was not an attorney of the Court. No advances of money having been made by the defendant, the Master refused to allow the costs. On a motion for the Master to review his taxation, *Reader v. Bloom*, an anonymous case in Chitty(g), and *Welch v. Pribble*(h), were cited: but the Court held that the de-

(f) 3 Younge & Jervis, 24.

(g) 2 Chit. Rep. 98.

(h) 1 Dow. & Ryl. 215, where it was held to be no ground for

cancelling a bail-bond, that the attorney who sued out the writ had neglected to take out his certificate.

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defendant was not entitled to costs. Mr. Baron Vaughan there said: "I confess that my mind has in some measure fluctuated during the discussion of this case, in consequence of the decision in the Court of Common Pleas to which allusion has been made (*Reader v. Bloom*). Upon examination, however, it will be found that the Chief Justice in his judgment proceeds upon an assumption that the plaintiff had at the outset made advances to the party who conducted his cause, which circumstance distinguishes that case from the present, for here no advances have been made; and the question resolves itself into this simple point, whether this Court will lend itself to put money into the pocket of an individual, who, not being an attorney of the Courts of King's Bench and Common Pleas, or legally entitled to practise as a solicitor in the Court of Chancery, has against his own client no remedy." In *Paterson v. Powell*, the defendant was held to be entitled to costs only to the extent of the actual advances made by him to his attorney on account of the suit.

Lord Chief Justice TINDAL.—I think we may determine this case without either affirming or disaffirming the authority of *Reader v. Bloom*. There, the action proceeded in the ordinary course: here, however, it proceeded solely for the benefit of plaintiff's attorney, the debt having been paid. At the time of suing out the writ, the gentleman who acted as attorney for the plaintiff was not in fact an attorney of either of the Courts; for, he did not take out his certificate for 1834, until the month of March in that year; whilst the writ was issued on the 6th December, 1833. This was a fact that must have been within his own knowledge. He must also have been aware that the debt was paid. I therefore think that this is a case in which we shall be well warranted, upon the construction of the 37 Geo. 3, c. 90, s. 31, in the exercise of our discretion, in refusing to permit the costs of the cause to fall upon the

defendant, seeing that the plaintiff never could be liable for them.

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Mr. Justice PARK.—Having been one of the Judges concurring in the decision of *Reader v. Bloom*, I should be unwilling to overturn it. As at present advised, I do not entertain an opinion adverse to that which I there gave. But, for the reasons assigned by my Lord Chief Justice, I think this case is distinguishable.

Mr. Justice GASELEE.—The case of *Reader v. Bloom* proceeded upon the idea of something having been paid by the client to the supposed attorney on account of the suit. Here no such fact appears: the plaintiff was not interested in the action. I cannot help observing that I think it necessary that the Court should adopt some better practice for obtaining the enrolment of attorneys than seems at present to exist. It is the duty of the clerk of the warrants to make the enrolment: but he can know nothing of what passes in Court; the only notice he has of the admission of an attorney is, by the production to him by the party himself of the admission which is obtained from the Secondary. This is a careless mode of proceeding that ought not to be tolerated.

Mr. Justice BOSANQUET.—I am of the same opinion. We need not on this occasion question the propriety of the decision in *Reader v. Bloom*. It is enough to say that this case is materially different from that, in the circumstance that here the suit proceeded solely for the benefit of the attorney.

Rule absolute (i).

(i) See the next case, which limits the doctrine of *Reader v. Bloom* to cases where no advances of money appear to have been made by the client to the supposed attorney on account of the suit, and recognizes the authority of *Paterson v. Powell*.

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Thursday,
June 5th.

The enrolment of an attorney in the Common Pleas is thus effected:—The party, on receiving his admission from the Secondary, takes it to the clerk of the warrants, who thereupon enters his name and address in a book kept for that purpose in alphabetical order. Unless enrolled, it is not competent to an attorney to sue for any fees or disbursements: therefore, where the defendant's attorney (in every other respect duly qualified to act as an attorney) had omitted to cause his name to be enrolled as above, the defendant

having made no advances on account of the expenses of the suit—The Court permitted the plaintiff to discontinue without paying costs.

Mr. Robinson now shewed cause (a).—This is an appli-

(a) *The affidavit upon which cause was shewn was made by the defendant's attorney, who deposed, that, on or about the 8th July, 1829, he, the deponent, was in due manner examined, sworn, admitted, and enrolled an attorney of the Court of King's Bench according to the statute, and duly obtained his certificate, and had since regularly taken out the proper annual certificate to enable him to practise as an attorney; that, before the commencement of this action, viz. on the 8th*

June, 1833, the deponent did duly obtain the fiat of one of the Judges of this Court, to authorize his being admitted to practise in this Court, and on the 10th June, and before the commencement of this action, and before he had practised as an attorney of this Court, he duly took the oaths of an attorney of this Court, and signed the roll of the Court produced for that purpose by one of the officers; that the deponent was informed by the officer that such admission was finally completed, and

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cation, not against the attorney who has been guilty of the supposed irregularity, as will be found to have been the case wherever this question has hitherto come before the Courts, but against the party—a materially distinguishing feature. In *Reader v. Bloom* (*b*) this Court expressly determined that a party who has obtained a verdict is entitled to his full costs, although the person who conducted his cause was not an attorney. Lord Chief Justice Best there said: “A plaintiff is not to be deprived of his costs because his attorney has not regularly taken out his certificate to qualify him to act as such; he must be taken to be ignorant as to the qualification of the person he employs as his attorney, and is not bound to inquire into or satisfy himself as to that fact. The legislature, in passing the statutes to which we have been referred (*c*), never intended to interfere with the rights of suitors; they have expressly guarded against it, and directed the punishment to be inflicted on the party offending. The proper course would have been for the defendant to have proceeded against the person who conducted the plaintiff's suit.” And the rest of the Court concurred in thinking that the application should have been made against the party who acted as the attorney. [Mr. Justice *Bosanquet*.—In *Latham v. Hyde* (*d*), the Court of Exchequer held that an at-

he verily believed that he had in every respect complied with the acts of parliament and the rules and practice of the Court; and that he was ignorant of any necessity of any *inrolment* in the office of the clerk of the warrants, until the fact was communicated to him by that officer subsequently to the commencement of this action, when he immediately caused his name to be duly inrolled. The affidavit also contained a

slight contradiction of the fact of the defendant having absconded: but it was altogether silent as to whether or not any advances of money had been made by the defendant to his attorney on account of the suit.

(*b*) 10 J. B. Moore, 261; 3 Bing. 9.

(*c*) 2 Geo. 2, c. 23; 22 Geo. 2, c. 46; and 37 Geo. 3, c. 90.

(*d*) 1 Crompton & Meeson, 128. 1 Dowl. P. C. 594.

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torney practising in a Court in which he has not been admitted cannot maintain an action for his fees or disbursements, neither has he any lien in respect of which he can prevent the damages and costs in one action being set off against those in another, though his costs have not been paid; and, in *Young v. Dowman* (*e*), that, where no money has been advanced by the client, the Court will not allow costs to an unqualified person. The three learned Barons who composed that Court seem to have thought the doctrine laid down by the Court of Common Pleas in *Reader v. Bloom* was one that ought not to be extended; and they distinguish it from the case before them, on the ground that the judgment of this Court proceeded upon the assumption that money had been advanced by the client to the attorney in the course of the suit.] In —— v. *Sexton* (*f*), Mr. Justice J. Parke recognized and acted upon the case of *Reader v. Bloom*. The attorney has substantially complied with all that the acts of parliament require. The 5th section of the 34 Geo. 3, c. 14, enacts "that any person who shall be *admitted* to be a solicitor or attorney in any of his Majesty's Courts at Westminster, by virtue, &c., may be *admitted* to be a solicitor or attorney in all or any of the Courts in that act mentioned, without payment of any further stamp-duty in pursuance of that act; subject nevertheless to all and every the provisions prescribed by law with relation to the *admission* of solicitors and attorneys in such Courts respectively before the passing of that act." As far as regards the admission, all has been done in the present case that the act requires: the only question is whether *inrolment* be also necessary; and, if so, whether the attorney has not been duly inrolled. The 2 Geo. 2, c. 23, s. 1, enacts that no person shall be permitted to act as an attorney, or to sue out any process, or to commence, carry on, or defend any action or actions, or any other pro-

(*e*) 3 Younge & Jervis, 24.(*f*) 1 Dowl. P. C. 180.

ceedings, either before or after judgment obtained, in the name or names of any person or persons, in his Majesty's Courts of King's Bench, &c., unless such person shall be sworn, admitted, and inrolled in the said respective Courts in such manner as is thereafter directed. And the 2nd section enacts "that the Judges of the said Courts respectively, or any one or more of them, shall, and they are thereby authorized and required, before they shall admit such person to take the said oath, to examine and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and, if such Judge or Judges respectively shall be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively shall, and they are thereby authorized to administer to such person the oath thereafter directed to be taken by attorneys, and, after such oath taken, to cause him to be admitted an attorney of such Court respectively, and his name to be inrolled as an attorney of such Court respectively, without any fee or reward other than one shilling for administering such oath; which admission shall be written on parchment in the English tongue, in a common legible hand, and signed by such Judge or Judges respectively, whereon the lawful stamp shall be first impressed, and shall be delivered to such person so admitted." The reasonable construction of these enactments is, that *inrolment* is not necessary to enable a party to practise as an attorney: the second section would seem to make the inrolment the act of the Judge or the Court. Besides, it appears from the affidavit that the defendant's attorney did actually sign the roll of the Court upon his being sworn. The practice upon this subject is thus stated by Mr. Tidd (g): "Antiently it appears there were rolls kept of the attorneys in the King's Bench; but, after the stamp act, that method was disused, and

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books kept in lieu of them (*h*). These books were considered in one case (*h*) merely as minutes to make up the record, and a warrant to the officer for that purpose: but, from the evidence given in a subsequent case (*i*), it appears that when an attorney is admitted and takes the oaths, he subscribes a roll, which is the original roll of attorneys, whence the names are copied into the above books."

[Mr. Secondary *Griffith*, being called upon by the Court to state the practice with regard to the admission and enrolment of attorneys in this Court, reported it to be as follows:—The party, having obtained the fiat of a Judge, the Secondary administers to him the oaths of allegiance and supremacy, together with the oath that he will truly and honestly demean himself in the practice of an attorney, which oaths the party afterwards subscribes, pursuant to the statute 2 Geo. 2, c. 23, on a roll kept for that purpose. The admission is then made out by the Secondary, and signed by the Judge who had previously signed the fiat: the party takes his admission from the Secondaries' Office, and causes his name and address to be entered in a book kept by the clerk of the warrants, which entry constitutes the enrolment (*k*)].

Mr. Serjeant *Wilde*, in support of his rule.—It is of the utmost importance that the public should have a ready means of ascertaining who are and who are not qualified to act as attorneys of the several Courts; and the enrolment is the only means by which this object can be effected. With this view, the acts of parliament relating to attorneys expressly require enrolment as well as admission. The 5th section of the 34 Geo. 3, c. 14, is the only enact-

(*h*) *Forster v. Cale*, 1 Str. 76, 7.

(*i*) *Rez v. Crossley*, 2 Esp. Rep. 526.

(*k*) This enrolment is distinct

from the enrolment of the annual certificate taken out at the Stamp-office.

ment in which the inrolment is not actually mentioned; but it expressly relates back to the statute of the 2 Geo. 2, c. 23, all the provisions of which shew inrolment to be necessary. By the 4th section of the 34 Geo. 3, c. 14, it is enacted, that, in case any person shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any of the Courts at Westminster as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted *and inrolled* an attorney or solicitor in one of the said Courts at Westminster, according to the directions of the several acts in force for the regulation of attorneys and solicitors, every such person shall, for every such offence, forfeit the sum of 100*l.*; and such person is thereby also made incapable to maintain or prosecute any action or suit in any Court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. In the present case it is admitted that the person by whom the defence has been conducted has not been inrolled, and therefore has not put himself in a situation to practise as an attorney of the Court. The affidavit upon which this motion was made shews that the defendant's attorney comes to recover costs for his own benefit; for, it is suggested, and scarcely denied, that the defendant has absconded; and it is not alleged on the part of the defendant that any advances have been made by him in the course of the cause. The assumption of this latter fact was the ground upon which this Court proceeded in the case of *Reader v. Bloom*, and the limit to which that decision was confined by the Court of Exchequer in *Young v. Dowman*, and by this Court in the subsequent case of *Paterson v. Powell* (*1*). The case of — *v. Sexton* is totally inapplicable: it appears that in that

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case the party had changed his attorney twice in the course of the suit; which could only have been on payment of costs; therefore that case falls strictly within the limited construction of *Reader v. Bloom*.

Lord Chief Justice TINDAL.—It is with some regret in the particular case that I arrive at the conclusion I have come to upon the construction of the statutes in question; for, there is no suggestion, and no ground for supposing that the defendant's attorney has in the slightest degree misconducted himself; but that the situation in which he now stands is occasioned solely by a very excusable misconception of the acts of parliament. The simple question is, whether, where an attorney has not been duly admitted and enrolled as an attorney of the Court, we can lend our aid to enable him indirectly to recover his costs, when he cannot do so directly. In applications of this description the Court must exercise its discretion; and it is imposed as a condition that the client shall not be prejudiced where he has advanced money to his attorney on account of the cause; and the Court will not interpose to prevent his recovering costs to the extent of such advances. The principal case relied on on the part of the defendant is that of *Reader v. Bloom*. I cannot but think that that case proceeded upon the assumption, whether well or ill-founded, that money is usually advanced by the client in the progress of the cause. Undoubtedly the case *Young v. Dowman* has considerably weakened the authority of *Reader v. Bloom* if it is to be carried further than I have stated. The simple question, then, is, whether the enrolment be a condition precedent to the attorney's right to recover costs. It has been contended on the part of the defendant, that enrolment is not necessary to enable the attorney to practise as such; and that on the authority of the 34 Geo. 3, c. 14, s. 5, which enacts that any person who shall be admitted to be a solicitor or attorney in any of his

Majesty's Courts at Westminster, by virtue &c., may be admitted to be a solicitor or attorney in all or any of the Courts in the act mentioned, without payment of any further stamp-duty in pursuance of that act. It is true that section only speaks of admission, and omits all mention of enrolment: but the following proviso or condition is subjoined—"subject nevertheless to all and every the provisions prescribed by law with relation to the admission of solicitors and attorneys in such Courts respectively before the passing of that act." This refers us back to the prior statutes regulating the admission of attorneys and solicitors, which make the enrolment imperative; and we cannot construe the later statute, which is merely an act passed for revenue purposes, as operating a repeal of the former ones. The 1st and 2nd sections of the 2 Geo. 2, c. 23, are clear and unambiguous: the former section enacts that no person shall be permitted to act as an attorney, or to sue out any process, or to commence, carry on, or defend any action or actions, or any other proceedings either before or after judgment obtained, in the name or names of any person or persons, in his Majesty's Courts of King's Bench, &c., unless such person shall be sworn, admitted, and enrolled in the said respective Courts in such manner as is thereafter directed; and by the latter section the Judges of the said Courts respectively are authorized and directed to administer to such person the oath in that act directed to be taken by attorneys, and, after such oath taken, to cause him to be admitted an attorney of such Court, *and his name to be enrolled as an attorney of such Court.* The 18th section prescribes the person by whom and the manner in which the enrolment shall be made, viz. "that the chief clerk of the Court of King's Bench, or his deputy, and the clerk of the warrants in the Court of Common Pleas, or his deputy, shall, and they are thereby respectively required, from time to time, without fee or reward, to enrol the name of every person who shall be

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admitted an attorney in the said respective Courts of law pursuant to the directions in this act, and the time when admitted, in an alphabetical order, in rolls or books to be provided and kept for that purpose in the said several offices; to which rolls or books all persons shall and may have free access without fee or reward." And the 24th section enacts, that, "in case any person shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any of the Courts of law or equity aforesaid, as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted and *inrolled* as aforesaid; every such person for every such offence shall forfeit and pay 50*l.* to the use of such person who shall prosecute him for the said offence, and is thereby made incapable to maintain or prosecute any action or suit in any Court of law or equity for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding." I am therefore of opinion, that, when the fact of the defendant's attorney having omitted to cause himself to be inrolled as the act directs is brought before the Court, and it is nowise to the prejudice of his client, we ought not to lend our aid to enable the defendant to recover costs from the plaintiff, inasmuch as his attorney is not in a condition to sue him in order to compel him to pay over such costs to him. The rule must therefore be made absolute.

Mr. Justice PARK.—It is with great reluctance that I come to the conclusion which my Lord Chief Justice has expressed. There was evidently no intention on the part of the gentleman in question to omit any of the ceremonials required by the statute. He probably thought that when he subscribed the oaths he was signing the roll of attorneys of the Court. But that is not the inrolment the

statute refers to; it is a roll kept for quite a different purpose. The enrolment required by the statute is that which was formerly entered on rolls, but is now for the convenience of reference entered in books in alphabetical order, as has been explained by our officer. The ground upon which the case of *Reader v. Bloom* proceeded was, that money had been advanced by the client to the attorney in the progress of the cause, the contrary not appearing. The case of *Young v. Dowman*, in the Exchequer, was argued by my Brother Patteson, and the ground upon which he as well as the Court distinguished that case from *Reader v. Bloom* was, that no advances had there been made by the client. The facts of the present case bring it precisely within *Young v. Dowman*.

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—The defendant's attorney not having been enrolled as required by law is not authorized to practise; and therefore the Court cannot allow him to recover compensation for business which he was not empowered to transact. *Reader v. Bloom* was determined upon the supposition that money was advanced by the client to the person who acted as his attorney in the course of the suit. That fact being negatived in *Young v. Dowman*, the Court of Exchequer came to a contrary decision. Here it does not appear that any money has been advanced; and therefore this case falls within the authority of the case last mentioned. It is true, the plaintiff's affidavits do not expressly deny the fact of advances being made; but enough is stated to call the attention of the other party to the subject, and neither the defendant nor his attorney has thought fit to assert it.

Rule absolute.

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*Friday,
May 23rd.*

One F. on his death bequeathed to his widow certain rents, with a proviso that they should go over to his children in the event of her marrying again. The widow married one G. by banns, in which she was, for the purpose of concealing the fact of the marriage, described by her maiden name. In an action by the testator's daughter against the personal representatives of G., to recover the amount of rents received by him during the life of Mrs. F., and whilst she and G. cohabited as man and wife:—Held, that the forfeiture did not take place, the marriage being void; and that the defendants were not estopped from taking advantage of its invalidity.

ALLEN and Wife v. Wood and Wife, Administratrix of GRIMMETT.

THIS was an action for money had and received, brought to recover from the defendants Wood and wife, the latter of whom was administratrix of one Grimmett, deceased, the amount of certain rents received by Grimmett in his lifetime under the following circumstances:—The wife of the plaintiff was the daughter of one Fuller, who on his decease bequeathed the rents in question to his widow for life, provided she continued a widow: but, in the event of her marrying again, the property was to go over to his children. In 1819, Mrs. Fuller intermarried with Grimmett: but, in order that the fact might be concealed from the children of her first marriage, the banns on the second were published describing her by her maiden name. Mrs. Fuller cohabited with Grimmett down to the time of her death, receiving the rents as the widow of Fuller, and, on her death, Grimmett attended her funeral, and erected a tomb-stone over her grave, on which he described himself as her husband. Under these circumstances, it was contended on the part of the defendants, on the authority of *The King v. Tibshelf* (a), that the second marriage was void, and consequently that the forfeiture had never been incurred by Mrs. Fuller.

Lord Chief Justice Tindal, before whom the cause was tried at the Sittings at Westminster after last Hilary Term, nonsuited the plaintiffs, with liberty to them to move to set the nonsuit aside, and enter a verdict, if the Court should be of opinion that the defendants were estopped from setting up the invalidity of the marriage.

Mr. Serjeant Spankie, in the course of the last term,

(a) 1 Barn. & Adolph. 190.

obtained a rule nisi accordingly.—He cited *Pougett v. Tomkins* (*b*) and *Rex v. Billinghurst* (*c*), and submitted that the marriage of Mrs. Fuller with Grimmett was valid, there being no fraud on the marriage laws. [Lord Chief Justice *Tindal*.—The only point upon which we entertain any doubt is whether it was competent to the defendants to assert the invalidity of the marriage.]

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Mr. Serjeant *Wilde* and Mr. Serjeant *Andrews* now shewed cause.—In *The King v. Tibshelf*, in the publication of banns in 1817, a woman named Mary Hodgkinson was called White, a surname entered by mistake in the register of her baptism, but which she had never gone by or been entitled to: the false name was given to the officiating clergyman without any intention to mislead, nor did any individual having an interest in the marriage appear to have been deceived: and yet it was held that the marriage was void. The principle is well laid down by Lord Tenterden in that case. “In a series of decisions upon the statute 26 Geo. 2, c. 38,” says his Lordship (*d*), “both in the Ecclesiastical Courts and in the Court of King’s Bench, it has been held, that the clear intention of the legislature was, that the banns are to be published in the true names of the parties, otherwise it is no publication at all. By these decisions, these rules are fully established—first, that, if there be a total variation of a name or names, that is, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid; and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.” That the marriage in this case be-

(*b*) 3 Mau. & Selw. 263.

(*c*) 3 Mau. & Selw. 256.

(*d*) 1 Barn. & Adolph. 195.

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tween Mrs. Fuller and Grimmett was void, is beyond question. This is not like a case where credit has been gained by a party by means of the representation of a marriage; but, on the contrary, the complaint is of the suppression of the fact. It is said that the defendants are estopped from shewing the marriage in question to be invalid, inasmuch as that would be permitting Grimmett, or those who represent him, to take advantage of his own wrong. The onus of proof to support this action, however, rested on the plaintiffs, and they shewed that the marriage was void: how then can they set it up as a forfeiture, or say that the defendants shall not be permitted to avail themselves of its invalidity? Looking to the policy of the act, and to the relative situations of the parties, no principle of law can be brought to bear upon the case to shew that the defendants are precluded from contending that no marriage ever took place in fact between Mrs. Fuller and Grimmett, the intestate; and consequently that the former never incurred a forfeiture of the bequest in question.

Mr. Serjeant *Spankie*, in support of his rule.—Enough was shewn in this case to estop the representatives of Grimmett from saying that there was no valid marriage between him and Mrs. Fuller. A marriage *de facto* was a sufficient marriage to deprive Fuller's widow of the estate bequeathed to her: and it was not competent to the supposed husband to assert his own turpitude. No man can be allowed to allege his own fraud to avoid his own deed; and therefore, where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game, it was held, that, as against the parties to the deed, it was valid, and was sufficient to support an ejectment for the premises—*Doe d. Roberts v. Roberts (e)*. There, as between the

parties, there was no conveyance at all. So, here, as between Grimmett and Mrs. Fuller, the marriage might be void, and yet good to a certain extent as to third parties. In *Crocker v. Fothergill* (*f*), certain lands were demised, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised. The tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig. It was held, that, although the latter could not be recovered under the declaration in ejectment, still that the tenant had by his own act estopped himself from taking that objection, and that, in an action for the value of three years' improved rent, under the statute 11 Geo. 2, c. 19, the landlord might recover the treble rent in respect not only of the demised premises, but of the mines in which the tenant had only liberty to dig. It was not necessary for the plaintiffs in this case to shew the circumstances by which the second marriage was invalidated: a marriage *de facto* was sufficient for their purpose.

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Lord Chief Justice TINDAL.—It appears to me that we may determine this case without at all infringing upon the general rule of law whereby a party is prohibited from asserting his own wrong. The plaintiffs in the present case seek to recover from the defendants as the representatives of Grimmett certain rents alleged to have come to the possession of Grimmett under the following circumstances:—The property in question was bequeathed by Fuller to his widow for life, with a proviso, that, in the event of

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her marrying again, the property should go to the testator's children. In the year 1819, Mrs. Fuller married Grimmett. On that occasion, for the purpose of concealing the fact of her marriage, and the consequent forfeiture of her interest under the will of her late husband, the banns were published, describing her by a false name. Now, it was a part of the plaintiffs' case to shew that the right of Fuller's widow to receive the rents bequeathed to her had determined by the second marriage. It has been contended that it was not necessary for the plaintiffs to shew the circumstances under which the supposed marriage between Grimmett and Mrs. Fuller took place. But I am of opinion that it would still have been competent to the defendants to shew the real character of that marriage. By the 2nd section of the statute 26 Geo. 2, c. 33, it is enacted that no parson, vicar, &c., shall be obliged to publish the banns of matrimony between any persons, unless they shall, seven days before, deliver to him "a notice in writing of their *true* christian and surnames," &c.: and by the 8th section, all marriages solemnized without publication of banns, or license of marriage, are declared to be null and void to all intents and purposes whatsoever: and it has been held that the banns must be published in the *true* names of the parties, otherwise it is no publication at all—*The King v. Tibshelf*. When, therefore, it was made to appear by the evidence adduced on either side that the marriage between Grimmett and Mrs. Fuller was void, how are we to say that the event has happened, in which the testator has declared that the bequest to his widow should cease and be forfeited? In *Wakefield v. Wakefield* (g), cited in a note to the case of *Rex v. Billinghurst*, Sir William Scott held, that, where a false name has been inserted in the banns, the marriage is illegal, though there was no

(g) 1 Hagg. 431, 1 Phill. Rep. 139, 140, in notes.

fraud intended. In *Frankland v. Nicholson*(*b*), Sir William Scott says: "I do not hold it to be necessary that there should be actual fraud on the individual party; it is enough if the thing leads to a probability of fraud; and this mode of conducting the matter would lead to such consequences and mischief as it is the intention of the legislature to prevent. It seems to me that Courts of justice are only following up that intention in preventing such modes as are so obnoxious, and lead to fraud. Certainly, if this mode was permitted, a man might be married to the wife of another person without the slightest knowledge of the fact; and many instances might be put in which a liberty of this kind would be extremely grievous." And many other cases might be cited wherein the same doctrine has been enforced by that very learned civilian. Here, therefore, the marriage being *ipso facto* void, how can we give effect to it, so as to hold that it operated a forfeiture of this bequest. I think the rule must be discharged.

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Mr. Justice PARK.—This action is brought to recover rents received on behalf of Mrs. Fuller during her supposed widowhood. It appears, that, in order to retain the benefit of her first husband's testamentary disposition in her favour, Mrs. Fuller, as was proved on the part of the plaintiffs, caused the banns on her second marriage to be published in her maiden name. It was part of the plaintiffs' title to shew that Mrs. Fuller was a married woman. They proved a marriage solemnized in direct violation of the act of parliament and of the decided cases: there was no valid publication of the banns. Marriage is a case that the legislature looks at most vigilantly; and it has declared that all marriages solemnized without publication of banns (that is, without a publication in the *true* christian and surname of the parties), or license, are null and void to all

(*b*) 3 Mau. & Selw. 261, n., 1 Phill. Rep. 147.

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intents and purposes. I am clearly of opinion that the marriage in this case was void, and consequently that the forfeiture contingent on that event never was incurred. This decision will in no respect militate against the cases where it has been held that a party shall not repudiate a character by the assertion of which he has obtained credit.

Mr. Justice GASELEE.—I am of the same opinion. The failure arose on the face of the plaintiffs' own title.

Mr. Justice BOSANQUET.—It was incumbent on the plaintiffs to shew that a marriage had taken place between Mrs. Fuller and Grimmett, in order to establish their right to the rents in question received since the period of the supposed forfeiture. They proved, however, a marriage which was to all intents and purposes void. Their title therefore fell to the ground. The object of Mrs. Fuller in causing the banns to be published in her maiden name, was, to conceal the fact of the second marriage. It has been contended that the Court must construe the will of Fuller to intend a marriage *de facto*: but I am of opinion that we must hold it to have reference to a marriage solemnized according to the law of England.

Rule discharged.

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M'ANDREW and Another v. ADAMES.

Wednesday,
May 28th.

THIS was an action on the case brought by the plaintiffs, the freighters, against the defendant, the master and owner of the ship Swallow, to recover damages for losses sustained by them in consequence of a delay on the part of the defendant in commencing a certain voyage. The first count of the declaration stated, that, on the 20th of October, 1832, to wit, at &c., by a certain charterparty of affreightment then and there made between the defendant, master of the good ship or vessel called the Swallow, then lying at Portsmouth, and the plaintiffs as affreighters of the said vessel, it was mutually agreed between the plaintiffs and the defendant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should proceed in ballast to the island of St. Michael's, or so near thereunto as she might safely get, and, after being well and sufficiently ballasted with stone or iron, and not with sand or any thing that might be prejudicial to the cargo, she should receive on board from the agents of the affreighters a full and complete cargo of fruit in boxes, which the affreighters thereby bound themselves to ship, not exceeding what she could reasonably stow and carry

By a charter-party dated the 20th October, 1832, it was agreed that the ship should proceed in ballast to St. Michael's, there take in a cargo of oranges, and sail therewith direct to London; that, for the purpose of loading and unloading the vessel, the freighters should be allowed thirty-five running days, to commence on the 1st December, provided the vessel had then arrived at St. Michael's, to continue till she was dispatched thence, to recommence on her arrival in London, and to cease on the discharge of the cargo; that the freighters should also be allowed

to keep the vessel ten days longer on demurrage; and that, in case the vessel should not be arrived at St. Michael's on or before the 31st January, it should be optional with the agents of the freighters whether they should load her or not: on the 7th November, the master sailed on an intermediate voyage to Oporto, and returned to Portsmouth; and on the 6th December sailed thence for St. Michael's, where he arrived on the 1st January, took in a cargo, and returned to London by the 1st February. In an action by the charterers against the owner for this deviation:—Held, that the sailing on the intermediate voyage, and thereby delaying the commencement of the voyage mentioned in the charterparty, whereby the cargo arrived at a period when the market was depressed, and consequently was sold at a loss, was a breach of the defendant's implied duty to commence the voyage within a reasonable time.

The plaintiffs, having sold the cargo to third persons, who in consequence of the late arrival of the ship sustained a loss, for which they called upon the plaintiffs to reimburse them:—Held, that the plaintiffs could not recover the money paid to these persons, by way of special damage—it not appearing that they were in a situation to compel the plaintiffs to make such payments, and the contracts with them appearing to have been entered into after the plaintiffs were aware of the breach of the charterparty.

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over and above her tackle, apparel, provisions, stores, and furniture; and, the vessel having been so loaded, should proceed with the said cargo direct to the port of London, or so near thereunto as she might safely get, and should there deliver the same; that the master should not put into any port with the vessel on her homeward passage, unless compelled by stress of weather or other unavoidable necessity (restraint of princes and rulers, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always mutually excepted); that the freight which should be paid for the said cargo should be $7l. 10s.$ per ton, together with ten guineas as a gratuity to the master for his care and attention to the cargo, according to the clauses and stipulations therein expressed for that purpose; that, for the purpose of loading and unloading the said vessel, the affreighters or their agents should be allowed the space of thirty-five running days in the whole, if required; that those days should commence on the 1st of December then next, provided the vessel had then arrived at St. Michael's and should be in readiness to receive her cargo (notice thereof being given to the shipper), and should continue until she was laden and dispatched from her loading port, and should recommence at her port of discharge on the day after her report at the Custom-House and being ready to unload, and should finally cease on her being fully discharged of her cargo; that the affreighters or their agents should also be allowed to keep the said vessel on demurrage for the space of ten running days over and above the days already thereinbefore allowed for loading and discharging, on paying for the same at and after the rate of $3l.$ per day. And by the said charterparty it was further agreed, that, in case the said vessel should not be arrived at St. Michael's and in readiness to receive her cargo on or before the 31st

of January then next, it should be optional with the agents of the affreighters whether they should load her or not; and that, in case they declined loading her, the charter-party should be null and void: penalty for the nonperformance of the said charterparty, 300*l.* And the said charterparty being so made as aforesaid, afterwards, to wit, on &c., at &c., in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to fulfil and perform the charterparty as such affreighters of the said ship or vessel as aforesaid in all things on their part and behalf to be performed and fulfilled, he, the defendant, undertook and then and there faithfully promised the plaintiffs to perform and fulfil the said charter of affreightment in all things on his part and behalf as such master of the said ship or vessel as aforesaid to be performed and fulfilled. Averment that, although the plaintiffs had always performed and fulfilled all things in the charterparty mentioned on their parts and behalves to be performed and fulfilled, to wit, at &c.; and although on the arrival of the said ship or vessel at St. Michael's aforesaid they always were ready and willing to have loaded in and on board the said ship or vessel a full and complete cargo of fruit in boxes; and although they had been always ready to pay freight according to the charterparty; and although it was the duty of the master, in pursuance of the charterparty, to have sailed and proceeded with the said ship or vessel from Portsmouth without any unnecessary deviation: yet the defendant, not regarding the charterparty, nor his said promise and undertaking, nor his duty in this behalf, but intending to injure the plaintiffs in this behalf, did not nor would (although not prevented by the restraint of rulers or princes, or any other of the matters or things excepted as aforesaid), after the making of the charterparty, sail from Portsmouth aforesaid with the said ship, in ballast, to the

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island of St. Michael's without making any unnecessary deviation therefrom; but, on the contrary thereof, he, the defendant, after the making of the said charterparty, to wit, on &c., at &c., did set sail with and carry the said ship or vessel towards Oporto, and, on arriving near to Oporto, did unnecessarily and improperly sail and proceed back again to Portsmouth aforesaid; and thereby he the defendant did make an unnecessary deviation out of the voyage from Portsmouth to the island of St. Michael's in the said charterparty mentioned, whereby the said ship did not arrive at St. Michael's until a long period of time after that at which she might have arrived there but for such unnecessary deviation aforesaid: by means of which said premises the ship did not reach the port of London with a certain cargo of fruit in boxes, which the plaintiffs caused to be shipped in and on board the said ship or vessel on her arrival at St. Michael's, until a long time, to wit, two months after she ought in due course to have arrived if she had sailed without unnecessary deviation to St. Michael's, according to the true intent and meaning of the said charterparty: by reason whereof the said cargo so loaded on board the said ship or vessel was of much less value than it might and otherwise would have been if the defendant had performed the voyage without such deviation as aforesaid; and thereby the plaintiffs lost divers large sums of money, to wit, the sum of 300*l.*; and also the plaintiffs, by reason of the delay in the arrival of the said ship or vessel as aforesaid, had been forced and obliged to pay and had actually paid to certain persons, to wit, to Messrs. Baylis & Co., and Messrs. Webb & Pilcher, to whom the plaintiffs had sold the said cargo, divers large sums of money, to wit, the sum of 260*l.*, to wit, at &c.

In the second count the defendant's undertaking was stated to be, to proceed on the voyage to St. Michael's "within a reasonable time after the making of the charter-

party;" in the third, " by and according to the usual and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same;" in the fourth, " without any unnecessary deviation from the said voyage, and without any unnecessary delay or hindrance in the same;" in the fifth, " within a reasonable time, without any unnecessary delay;" and the sixth was similar to the third, with the omission of the special damage alleged to have been sustained by the payments to Baylis & Co., and Webb & Pilcher.

The defendant pleaded the general issue.

The cause was tried before Lord Chief Justice Tindal, at the Sittings in London after the last Hilary Term. The circumstances were as follow:—On the 20th October, 1832, the plaintiffs, fruit merchants and agents in London, entered into the charterparty set forth in the declaration, with the defendant, the master and owner of the ship Swallow, then lying at Portsmouth, by the terms of which charterparty it was agreed that the ship should proceed to St. Michael's in ballast, and bring thence a cargo of oranges for the plaintiffs, and proceed therewith direct to London. For the purpose of loading and unloading the ship, the freighters were to be allowed thirty-five running days, if required, to commence on the 1st December, provided the vessel had then arrived at St. Michael's, and was ready to receive her cargo. And it was further agreed that, in case the vessel should not have arrived at St. Michael's, and be in readiness to receive her cargo, *on or before the 31st January*, it should be optional with the agents of the freighters whether they would load her or not; and, in case they declined loading her, the charter-party should be null and void. On the 8th November, the ship sailed from Portsmouth with troops on board for the service of Don Pedro, which were intended to be landed at Oporto. On her arrival at Oporto, however, which

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was about the 18th November, finding it impossible, in consequence of the surf and the batteries erected by Don Miguel on the banks of the Douro, to effect a landing, after waiting three or four days, the vessel returned to Portsmouth, where she arrived on the 28th, and relanded the troops. On the 6th December, she proceeded to St. Michael's, arrived there about the 1st January, took in a cargo, sailed thence about the 12th, and arrived in London on the 1st February.

On the 9th November, the plaintiffs wrote to the defendant the following letter:—" It having to-day been made known to us that you have taken the Swallow to Oporto with passengers, on her way to St. Michael's, in place of proceeding direct, we avail ourselves of the earliest opportunity to acquaint you we consider you thereby to have deviated from the due performance of the charterparty entered into with us, and bearing date the 20th ultimo, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct."

Oporto is out of the direct course to St. Michael's. A voyage to the latter place is usually made in twelve or fourteen days. Had the defendant therefore proceeded direct to St. Michael's in the first instance, the cargo might reasonably have been expected to be delivered in London by the end of December or beginning of January. Upon the supposition that this would be the case, the plaintiffs had agreed to cause the cargo to be consigned to Messrs. Baylis & Co., and Messrs. Webb & Pilcher, at the usual shipping price at St. Michael's at the time of shipment. In consequence of the delay occasioned by the intermediate voyage, and the non-arrival of the vessel till the 1st February, when the London market was overstocked, and the price of oranges materially depressed, a loss was sustained of 10s. 6d. per box; and the plaintiffs were called upon to pay and did pay to Baylis & Co. and Webb &

Pilcher 254*l.* 12*s.* 6*d.*, being at the rate of 10*s.* 6*d.* per box for the number of boxes that composed the cargo.

The contract with Webb & Pilcher did not take place till the 23rd of November; and, as to that with Baylis & Co., it appeared from the evidence of Mr. Baylis, that, though he began to negotiate with the plaintiffs for a purchase of fruit on the 20th of October, no contract was actually entered into till the 27th November. These contracts appeared to have been made by the plaintiffs as agents for Brander, the shipper at St. Michael's, who drew upon Baylis & Co. and Webb & Pilcher for the amount; but it did not appear that the plaintiffs had bound themselves to deliver the oranges to those persons by any particular time, nor that any particular lot of oranges was kept back at St. Michael's to be loaded for them on board the Swallow. It further appeared that the fruit season in London begins about Christmas; that what are called early ships are usually chartered in October or November; that a ship chartered by that time might be expected to be in London at Christmas, which is the most advantageous time for the importer; that the loading generally occupies two days; that the Swallow was a fast sailing vessel, and must in the ordinary course of things have arrived here before Christmas had she sailed from Portsmouth direct to St. Michael's on the 8th November; and that, in the beginning of February, oranges are almost unsaleable, from the glut in the market: but that ships are chartered in all January, in order to obtain a successive supply.

On the part of the defendant, it was submitted that the stipulation in the charterparty that the ship should proceed to St. Michael's in ballast, did not preclude the master from taking on board goods or passengers on an intermediate voyage, provided he arrived at his destined port within a reasonable time; that that reasonable time in the

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present case was pointed out by the charterparty itself, which, though it contemplated the possibility of the ship's arrival at St. Michael's by the 1st of December, was complied with by its arrival on or before the 31st of January: and that, at all events, the plaintiffs were not entitled to recover in respect of the special damage alleged in the declaration, it not appearing that the contracts entered into by them with Messrs. Baylis & Co. and Webb & Pilcher were of such a nature as to make them legally responsible to pay to those persons the sums alleged to have been paid to them, and those contracts not having been entered into until after the breach of which the plaintiffs complained had been committed.

A verdict was entered for the plaintiffs for 254*l.* 12*s.* 6*d.*, with leave to the defendant to move to enter a nonsuit on the ground first taken, or to reduce the damages in case the Court should be of opinion that the second objection only was well founded.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi accordingly.

Mr. Serjeant *Spankie* and Mr. *Watson* shewed cause.—Under the terms of this charterparty, it was incumbent on the defendant to proceed to St. Michael's without deviation or delay. He had no right to sail on an intermediate voyage to a port out of the proper course to St. Michael's; for though the stipulation that the ship should sail in ballast might not preclude the master from making use of his vessel on the outward voyage, it at all events means that he shall not incumber himself with any thing having a tendency to impede or delay the commencement of the voyage contemplated. The course of the trade, as proved at the trial, shewed that it was of importance to the plaintiffs that the voyage should be an early one; and the defen-

dant was bound to know the usage of the trade in which he had engaged his vessel—*Vallance v. Dewar* (a). Sailing for Oporto with troops, which had the effect of delaying the commencement of the voyage an entire month, was clearly not a reasonable exercise of any liberty implied on the face of the charterparty. It was not a fair compliance with the defendant's engagement: but, on the contrary, a wilful, unauthorized, and unnecessary act conduced to the damage of the plaintiffs. In *Davis v. Garrett* (b), it was held that the law implies a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course. The defendant there received on board his barge certain lime to be conveyed for the plaintiff from Bewly Cliff to London. The master deviated from the usual and customary course of the voyage, without any justifiable cause, and, whilst the barge was so out of her course, she encountered a storm, and the sea communicating with the lime caused it to ignite, whereby the barge and cargo were lost. In an action on the case for the loss of the lime, the declaration alleged that it was the duty of the defendant to have carried and conveyed the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from or delay or hindrance in the same, and averred the loss to be by reason of the deviation and departure, and delay and detention out of such usual and customary course and passage. It was held, that the damage sustained by the plaintiff was sufficiently proximate to the wrongful act of the defendant to form the subject of an action; and that the declaration was sufficient to support a judgment for the plaintiff. In *Mount v. Larkins* (c), a policy was effected in London on

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(a) 1 Camp. 503. (b) 4 Moore & Payne, 540, 6 Bing. 706.

(c) Ante, Vol. 1, p. 165, 8 Bing. 108.

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the 28th February, 1824, on freight valued upon the ship Aquila, "at and from Singapore and Batavia, both or either, to the ship's port or ports of discharge in Europe;" with liberty "to sail to, touch, and stay at any ports or places whatsoever and wheresoever, particularly at the Cape of Good Hope, St. Helena, or elsewhere, to load, unload, and reload goods and passengers, or otherwise, and for all or any other necessary purposes whatsoever." The ship sailed from London in the beginning of September, 1823, and arrived at Singapore on the 30th March, 1825. In an action on the policy, for a total loss, the jury returned a special verdict, in which, after setting out particular instances of delay in the course of the voyage on the part of the captain, they found "that there was unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk intended to be insured against." It was held that such unreasonable and unjustifiable delay on the part of the assured in commencing the voyage insured, was in the nature of a deviation, and amounted to such an alteration of the risk insured against as to discharge the liability of the underwriters upon the policy. Lord Chief Justice Tindal, in delivering the judgment of the Court said: "The underwriter has as much right to calculate upon the outward voyage upon which the ship is then engaged being performed within a reasonable time, and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as-to the underwriter, who has another risk substituted instead of that which he has insured against; and in both cases the alteration is occasioned by the wrongful act of the assured himself." So, in *Freeman v. Taylor* (*d*), where the plaintiff chartered a ship to the defendant, from Lon-

(d) *Ante*, Vol. 1, p. 182, 8 Bing. 124.

don to Madeira and the Cape of Good Hope, and thence to Bombay, and back to London. Instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the Mauritius, and the defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo. In an action by the owner against the defendant for not loading the ship with a cargo at Bombay pursuant to the charter-party, it was left to jury to say whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and they were told, that, if such was their opinion, the defendant was excused by the act of the plaintiff from furnishing a cargo. The jury having found for the defendant, the Court, on the authority of *Mount v. Larkins*, refused to grant a new trial, holding the direction right. In neither of these cases was there any stipulation as to the period at which the voyage was to commence: but it was held that the master was bound at all events to sail within a reasonable time; and what is or is not a reasonable time is a question for the jury.

The damages given by the jury were estimated according to the actual loss occasioned by the arrival of the cargo in a depressed market: and the plaintiffs were impliedly bound by their contracts with Baylis & Co. and Webb & Pilcher to supply the oranges at the earliest possible moment. The plaintiffs were the freighters of the vessel, & the vendors of the cargo. In *Davis v. James*(e), it was held that an action lies against a carrier in the name of the consignor. In an action by the consignor of goods against a carrier for non-delivery, the plaintiff alleged that the defendant undertook to deliver &c., in consideration of the hire to be paid by the plaintiff, and proved that the hire was to be paid by the consignee: and it was held to

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be no variance, the consignor being liable by law—*Moore v. Wilson* (*f*). So, in *Freeman v. Birch* (*g*), it was held that the bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. In the present instance, if these plaintiffs be held incapable of suing for the injury, no person can sue; for, Brander cannot, there being no privity of contract between him and the defendant.

Mr. Serjeant *Wilde*, in support of his rule.—This is in substance a charterparty for a voyage from St. Michael's to London. The alleged deviation took place, not after the plaintiffs' goods had been received on board, but antecedent to the arrival at St. Michael's, where the voyage was to commence. The stipulation that the ship should go out in ballast means no more than this, viz. that the freighter shall not have the privilege of shipping goods on the outward voyage, not that the owner shall be deprived of the use of his vessel. It was perfectly competent to the owner to use the ship in any way he might think fit, provided he arrived at St. Michael's within a reasonable time, with reference to the objects of the parties as disclosed by the charterparty. *Max v. Roberts* (*h*) and *Davis v. Garrett* have very little application to the present case: in the former, the deviation occurred whilst the plaintiff's goods were on board, and they were consequently exposed to an additional and improper peril; and in the latter, the reception of the goods under the circumstances gave rise to an implied contract on the part of the owner to proceed according to the usual and customary course of the voyage. *Vallance v. Dewar* is likewise distinguishable; for, though the defendant in this case was bound to import into the trade in which he had embarked his vessel a knowledge of its

(*f*) 1 Term Rep. 659.

(*g*) 1 Nev. & Man. 420.

(*h*) 12 East, 89—cited and com-

mented on very fully in the case of *Davis v. Garrett*, 4 Moore & Payne, 540.

customs, this cannot be supposed to include a knowledge of the fluctuations of the London market. In *Mount v. Larkins* and *Freeman v. Taylor*, there being no time stipulated for the performance of the voyage, it was held that it must be commenced within a reasonable time. Here, a certain time for the ship's arrival at St. Michael's is specified in the charterparty: it was evidently contemplated by the parties, that, although she might arrive there by the 1st December, the owner was not to lose the benefit of the charter-party if she arrived at any time before the 31st January; and she did in fact arrive before that day. There is nothing on the face of the charterparty to shew that an early arrival was desired by the plaintiffs. The evidence shewed that ships continued to arrive in London for a long period after the time at which the *Swallow* arrived, in order to furnish successive supplies to the fruit market.

No special damage legally resulted to the plaintiffs from the delay. The depreciated market could not affect them, for they had no interest in the sale of the cargo. Besides, it did not appear that the plaintiffs had entered into any contracts at all, either with Baylis & Co., or with Webb & Pilcher, until long after the occurrence of the breach of the charterparty complained of. In all the authorities cited on this part of the case, the parties had a special property in the goods; the contracts were for the carriage of specific goods, and the breaches occurred after the contracts had been entered upon. Here, it did not appear that any particular cargo had been reserved by Brander for shipment on board the *Swallow* on account of Baylis & Co. and Webb & Pilcher: on the contrary, it would seem that none was ready when she arrived at St. Michael's, for she was detained there twelve days, when the evidence shewed that she might have been loaded in two.

Lord Chief Justice TINDAL.—This case comes before the Court with a double aspect—first, on a motion to enter

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a nonsuit—secondly, supposing the Court to be of opinion that the verdict must stand for the plaintiffs, that it may be reduced to nominal damages. It appears to me, on the best consideration I have been able to give to the case, that the verdict ought to stand, but that the damages should be reduced. The broad question is, whether or not, upon the construction of this charterparty, there has been any unnecessary delay on the part of the defendant in commencing the voyage to St. Michael'a. No doubt, in all contracts of this nature, where no express time is fixed for the commencement of the voyage, the law implies a stipulation that there shall be no unnecessary or unreasonable delay in commencing it, and no unnecessary deviation from the ordinary course of the voyage when once commenced. All the authorities are agreed in this: they are all commented upon at length in the cases of *Mount v. Larkins* and *Freeman v. Taylor*. Roccus (i) also lays down the law in conformity with what I have above stated. Such, therefore being the general rule, if there be any delay in the performance of the voyage, it is incumbent on the party guilty of the delay to account for and excuse it: and the question here is, whether the defendant has proceeded on the voyage mentioned in the charterparty, according to the terms thereof, and without unreasonable delay. In many cases, I admit, it is very difficult to say what is or is not an unreasonable delay: it is always safer, therefore, to refer to the contract itself. Now, looking at this charterparty, the time between the date of it and the commencement of the voyage being consumed in an intermediate voyage, I think the delay was clearly unreasonable. The charterparty was entered into on the 20th October, 1832. The first stipulation is, that "the vessel, being tight, staunch, and strong, and every way fitted for the voyage, should proceed in ballast to the island of St.

(i) *Roccus de Navibus et Naulo*, note 56.

Michael's, or so near thereunto as she might safely get." I do not lay much stress on this stipulation that the vessel shall proceed to St. Michael's in ballast, further than saying that it seems to imply that the defendant undertakes not to take on board any thing calculated to retard the commencement of the intended voyage. The charterparty then goes on to provide for the reception of a cargo of fruit, and states that "the said vessel having been so loaded shall proceed with the said cargo direct to the port of London, or so near thereto as she may safely get, and shall there deliver the same;" and, after certain other stipulations to which it is unnecessary more particularly to refer, it is provided, that, "for the purpose of loading and unloading the said vessel, the said affreighters or their agents shall be allowed the space of thirty-five running days in the whole, if required; these days shall commence on the 1st day of December next, provided the said vessel has then arrived at St. Michael's, and in readiness to receive her cargo, and notice thereof given to the shipper; shall continue until she is laden and dispatched from her loading port, recommence at her port of discharge on the day after her report at the Custom-House, and being ready to unload; and shall finally cease on her being fully discharged of her cargo. The said affreighters or their agents shall also be allowed to keep the said vessel on demurrage for the space of ten running days over and above the days already allowed for loading and discharging, on paying for the same at and after the rate of 3*l.* per day." It appears to me, that, inasmuch as the parties have stipulated that the lay days should commence on the 1st December, that was the day contemplated by them for the arrival of the vessel at St. Michael's. I admit that if, in consequence of any unforeseen and inevitable accident, the vessel had been prevented from arriving at her destined port abroad on the day mentioned, the delay would have afforded no ground of action. But I cannot other-

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wise construe the agreement that the lay days shall commence on a particular day, than that the parties must have contemplated that, all things convening, the voyage mentioned in the charterparty should commence on and from that day. That the voyage might so have commenced, is clear from the evidence given at the trial as to the average duration of the voyage hence to St. Michael's. The charterparty further declares that, "in case the said vessel shall not be arrived at St. Michael's, and in readiness to receive her cargo, on or before the 31st day of January next, it shall be optional with the agents of the said affreighters whether they load her or not; and, in case they decline loading her, this charterparty shall be null and void." That stipulation was introduced for the benefit of the charterers only—giving them the option to repudiate the contract in the event of the vessel's non-arrival by the day stated, notwithstanding the owner might have a reasonable excuse for not having arrived earlier. This seems to me to be the true construction of the charter-party. The evidence given as to the course of the trade, and the importance to the plaintiffs of an early arrival, as also their letter of the 9th November, all shewed that they at least must have contemplated a speedy and immediate voyage. In this letter the plaintiffs say:—"It having to-day been made known to us that you have taken the Swallow to Oporto with passengers, on her way to St. Michael's, in place of proceeding direct, we avail ourselves of the earliest opportunity to acquaint you we consider you thereby to have deviated from the due performance of the charterparty entered into with us and bearing date the 20th ultimo; and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct." I therefore think there has been a breach of the charterparty, the defendant having delayed the commencement of the voyage without any justifiable cause, and having sailed on an inter-

mediate voyage contrary to the intention of the instrument.

With regard to the second point—The cause of action is the breach of the charterparty; and the general principle is, that, where a contract has been broken, the law gives *some* damages. Here, special damage is alleged in the declaration: the plaintiffs therefore were bound to prove it. It is stated that the plaintiffs, “by reason of the delay in the arrival of the vessel occasioned as aforesaid, had been forced and obliged to pay, and had actually paid to certain persons, to wit, to Messrs. Baylis & Co. and Messrs. Webb & Pilcher, to whom the plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l.*” Looking at the evidence offered in support of this averment, it does not appear that any such contracts had been entered into between the plaintiffs and Messrs. Baylis & Co. and Webb & Pilcher as to render the plaintiffs liable to those persons for the sums they have thought proper to pay them; nor that any specific cargo was kept back at St. Michael’s to be loaded for them on board the Swallow. The special damage therefore has not been proved, and consequently the verdict must be reduced to one shilling.

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Mr. Justice PARK.—In all cases of maritime transactions expedition is the essence of the contract. In Abbott on Shipping (*k*) this is laid down as a general rule, taking into account the usage of the trade to which the contract has reference: and a party who enters into a particular trade is bound to be acquainted with its usages. In the present case, I agree with my Lord Chief Justice that there is no doubt but that the charterparty has been broken by the defendant. The general rule of our law is also in

(*k*) 5th edit. p. 239—cited in *Davis v. Garrett*, 4 Moore & Payne, 545.

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accordance with the opinions of all the foreign writers on the subject. In *Roccus* it is clearly stated. And *Emerigon*, speaking of the practice of making intermediate voyages pending a contract of insurance, after having cited two decisions of the French court wherein such intermediate voyages had been held not to vitiate the policy, remarks (*i*)—“ Mais cet jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que, si, avant que le voyage assuré soit commencé, le capitaine en entreprendre un autre, l’assurance est nulle, et la prime doit être restituée.” In *Mount v. Larkins* the same principle is laid down as that which we now affirm: as likewise in *Freeman v. Taylor*. There, the plaintiff chartered a ship to the defendant for a voyage from London to Madeira and the Cape of Good Hope, and thence to Bombay, and back to London. Instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the Mauritius, and the defendant’s agents at Bombay, in consequence of such deviation, refused to find a cargo. In an action by the owner against the defendant for not loading the ship with a cargo at Bombay, pursuant to the charterparty, it was left to the jury to say whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and they were told, that, if such was their opinion, the defendant was excused by the act of the plaintiff from furnishing a cargo. The jury having found for the defendant, the Court refused to grant a new trial, holding the direction right. Thus, the decision in that case was in conformity with the general law above stated. So, in *Palmer v. Marshall*, the rule is in like manner laid down.

(*i*) Vol. 1, c. 13, s. 10.

Lord Chief Justice Tindal says (*m*): "The policy was dated the 28th January, 1831, and the vessel remained in the dock or float at Bristol until the 17th of May. She then sailed on her voyage, and was lost. This action is brought to recover from the assurers the amount insured. It appears to me that this policy, on the part of the assured, implies that the voyage was in the immediate contemplation of the parties. The question is, whether, the voyage not taking place until so long a period as nearly four months from the time of insuring, we must not hold that there has been such an unreasonable delay as will avoid the policy, unless accounted for by the party setting up the policy." And Mr. Justice Alderson says: "It seems to me that a delay, to be excusable, must be a delay necessarily incurred for the purposes of the voyage. Here, the vessel was complete and ready for sea at the time of effecting the policy; and the delay, which was very considerable, has not been accounted for." So here, no reason amounting to an excuse has been assigned for delaying to commence the voyage mentioned in the charterparty. In *Davis v. Garrett* also the doctrine is fully gone into by my Lord Chief Justice, who, in delivering the judgment of the Court, says (*n*): "We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation, in the usual and customary course." It would be absurd to contend, that, where a party undertakes a voyage to St. Michael's, he proceeds by the usual and customary course when he sails on an intermediate voyage to Oporto. The charterparty itself manifestly contemplates an early voyage: and the whole of the evidence shewed that an early voyage would be the most advantageous to the shippers, and was such as they undoubt-

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(*m*) *Ante*, Vol. I, p. 456. (*n*) 4 *Moore & Payne*, 556, 6 *Bing.* 725.

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edly did expect and had a right to expect. As to the stipulation giving the plaintiffs an option to repudiate the contract in the event of the non-arrival of the ship at St. Michael's by the 31st January, whence an argument has been drawn, on the part of the defendant, that the charterparty was complied with provided the voyage commenced before that day—it seems to me that that provision was merely introduced as a sort of penalty on the defendant, but not for the purpose of pointing out the period at which the intended voyage should commence. The plaintiffs' letter of the 9th November, complaining of the vessel's having sailed on an intermediate voyage, clearly shews that the charterers at least thought that such voyage was inconsistent with the charterparty.

With regard to the second question—I own I thought damages had not improperly been given, inasmuch as the plaintiffs were the only persons who could sue for the breach of the charterparty. But it is admitted, that, to entitle them to recover in respect of the special damage alleged, they must establish that such contracts had been entered into by them with Baylis & Co. and Webb & Pilcher, on the faith of the charterparty, as would give those parties respectively a right of action against the present plaintiffs. In this I yield to the better opinion of my Lord Chief Justice.

Mr. Justice GASELEE.—The first question in this case is, whether the plaintiffs are entitled to recover at all; the second, what amount of damages: the former has been already so fully gone into that it would be merely waste of time to say more than that I entirely agree in the opinions expressed by my Lord Chief Justice and my Brother Park. I am clearly of opinion that there is nothing in this case to distinguish it from the authorities they have cited; more particularly that of *Davis v. Garrett*, where it is distinctly laid down that the law implies a duty in the owner

of a vessel to proceed without unnecessary deviation in the usual and customary course of the voyage.

With regard to the special damage—It is admitted that, to entitle the plaintiffs to recover in respect thereof, it was incumbent on them to establish that Baylis & Co. and Webb & Pilcher were in a situation to compel the plaintiffs to make the payments they did. It does not appear to me that this was made out on the evidence. With respect to Baylis & Co., there is no evidence to shew what their contract was. Mr. Baylis, who was called, stated that he began to negotiate with M'Andrew & Son for oranges on the 20th October, the latter, it would seem, acting as the agents of Brander; but there is no evidence of the nature of this negotiation till the 27th November, fourteen days after the breach was incurred. The alleged contract with Webb & Pilcher was not entered into till the 23rd November. Under these circumstances, I agree with the rest of the Court, that the rule for reducing the damages must be made absolute.

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Mr. Justice Bosanquet.—I am of the same opinion upon both points. The general principle is clear, that, in contracts of this nature, unless it be otherwise expressly agreed, performance must follow within a reasonable time, and without any unnecessary delay: and there appears to me to be nothing in the charterparty in the present case to control that general principle. The stipulation that the ship should proceed to St. Michael's in ballast seems to me to shew that the parties intended that the voyage should not be delayed by engaging the ship in any intermediate traffic. The clause in the charterparty as to the lay days commencing on the 1st December, certainly does not amount to a warranty that she should arrive by that day, provided she were prevented from so doing by any justifiable cause: but still it shews that it was in the contemplation of the parties that the vessel might arrive by the 1st

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December. Then, the agreement that, in case the vessel did not arrive at St. Michael's on or before the 31st January, the agents of the plaintiffs were to have the option of loading her or not, was inserted with a view to quicken the owner, not by way of license to him to retard the voyage till that day. It appears that the ship sailed from Portsmouth on the 7th November; there was ample time therefore for her arrival by the 1st December, for it was in evidence that the voyage is usually performed in about fourteen days. The arrival of the ship at St. Michael's was, however, delayed by the voluntary act of the owner, in undertaking an intermediate voyage to Oporto. It therefore appears to me that the charterparty has been broken by the defendant, and that the plaintiffs, having thereby lost the advantage they contemplated in an early voyage, are entitled to maintain the action.

Then, as to the damages—The plaintiffs, it seems, did not charter the ship with a view to shipping a cargo on their own account; but for the purpose of procuring shipments for others: they therefore personally have sustained no loss. But if, in consequence of the charterparty, the plaintiffs have entered into any contracts with third persons, under which contracts they have been or may be legally compelled to pay any sums of money, they are entitled to recover such sums from the present defendant. Upon the evidence, however, it does not appear that they are placed in such a situation: they were not bound to make the payments they have made.

Rule absolute to reduce the verdict to one shilling.

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**BAKER and MARY his Wife, Executrix of JOHN HUTCHINS,
Deceased, v. GOSTLING.**

*Tuesday,
May 27th.*

THIS was an action of covenant. The declaration stated that the said John Hutchins, deceased, in his lifetime, and at the time of making the indenture thereafter mentioned, was lawfully possessed of a certain messuage or dwelling-house, situate, &c., with the appurtenances, for the residue and remainder of a certain term of thirty-one years, commencing from the 25th December, 1823, then to come and unexpired therein, and of which said term therein divers, to wit, twenty years and upwards were still to come and unexpired, to wit, &c.: and the said John Hutchins, being so possessed thereof, by a certain indenture made in his lifetime, on the 17th December, 1825, between the said John Hutchins of the one part, and the defendant of the other part, the counterpart, &c. (profert), the said John Hutchins for and in consideration of the sum of 100*l.* by the defendant to the said John Hutchins in hand paid, and also in consideration of the yearly sum of money, covenants, and agreements thereafter mentioned and contained by and on the part and behalf of the defendant, his executors, administrators, and assigns to be paid, kept, done, and performed, assigned unto the said defendant, his executors and administrators, and also to his assigns, to be licensed as thereafter mentioned, the said messuage or dwelling-house, &c. (except, &c. &c.); to have and to hold the said messuage and premises thereby assigned, and every part thereof, unto the defendant, his executors, administrators, and assigns, to be licensed as thereafter mentioned, from the 29th September then last past for and during the residue and remainder of the said term of years then to come and unexpired; yielding and paying therefore yearly and every year during the said residue and remainder of the said term unto the said John Hutchins, his

A lessee for years under-demaned for a term longer than the residue held by him, the under-lessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.*, by quarterly payments: — Held, that notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, covenant lay at the suit of the executor of the lease, to recover arrears of this rent accruing during the continuance of the lessee's term.

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executors and administrators, the *yearly sum* of 75*l.* by equal quarterly payments, on &c., without any deduction or abatement whatsoever: and the defendant did thereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with John Hutchins, his executors and administrators (amongst other things), in manner following, that is to say, that he, the defendant, his executors, administrators, and assigns, should and would pay unto John Hutchins, his executors and administrators, the said yearly sum of 75*l.* in the proportions and on the days thereinbefore appointed for payment thereof, without any deduction or abatement whatsoever: By virtue of which said assignment the defendant afterwards, to wit, on the said 17th December, 1825, entered into and upon all and singular the said assigned premises, with the appurtenances, and became and was possessed thereof for the said residue and remainder of the said term so to him thereof assigned: And, although the said John Hutchins in his lifetime, and the plaintiffs, as the said Mary is executrix as aforesaid, since the death of the said John Hutchins, have always, &c. [averment of performance]: Breach—that, after the making of the said indenture, and during the continuance of the said term thereby assigned, and after the death of the said John Hutchins, to wit, on &c., a large sum of money, to wit, the sum of 243*l.* 15*s.* of the said *yearly sum* of 75*l.* in the declaration mentioned, for divers (to wit) thirteen of the said quarterly payments therein mentioned, according to the form and effect of the said indenture and of the said covenant of the defendant, became and was due and payable from the defendant to the plaintiffs, as the said Mary is executrix as aforesaid, and still was in arrear and unpaid, contrary to the form and effect of the said indenture and of the said covenant of the said defendant in that behalf: And so, &c.

The defendant craved oyer of the indenture in the de-

claration mentioned, and pleaded—first, non est factum—secondly, That all the estate, &c., which the said the John Hutchins, at the time of making the said supposed indenture in the declaration mentioned, or at any time afterwards, had of and in the premises with the appurtenances in the declaration mentioned, were derived by him under and by virtue of a certain indenture made the 1st August, 1824, between Sir Richard Sutton, Bart., of the one part, and the said John Hutchins of the other part, and sealed with the seal of the said Sir R. Sutton; by which indenture the said Sir R. Sutton demised and let to the said John Hutchins all the premises mentioned in the said indenture in the declaration mentioned, to have and to hold the same unto the said John Hutchins, his executors, administrators, and licensed assigns, from the 25th December then last past for and during and unto the full end and term of thirty-one years from thence next ensuing, at and under a certain yearly rent, to wit, the yearly rent of 35*l.* thereby reserved and made payable to the said Sir R. Sutton: by virtue of which demise the said John Hutchins in his lifetime afterwards, and before the making the supposed indenture in the declaration mentioned, to wit, on the said 1st August, 1824, entered into and upon all and singular the said premises with the appurtenances so demised to him by the said indenture of the 1st August, 1824, and being the premises in the declaration mentioned, and became and was possessed thereof for the said term so to him thereof granted as aforesaid: And the said John Hutchins being so possessed thereof, he afterwards, and in his lifetime, and during the said term granted by the said indenture of the said 1st August, 1824, to wit, on the said 17th December, 1825, by a certain indenture then and there made between him the said John Hutchins of the one part and the defendant of the other part, and sealed with the seal of the said John Hutchins, (but which said indenture, and the estate, term, and interest thereby

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demised and granted, after the making therof, and long before the time of the commencement of this suit, and long before any part of the said supposed term in the supposed indenture in the declaration mentioned became due, if the same or any part thereof ever did become due, to wit, on the 4th November, 1830, were bargained, sold, assigned, transferred, and set over by the defendant to one Thomas Smith, and the said indenture was then and there delivered by the defendant to the said Thomas Smith, and is now in the power, custody, or possession of the said Thomas Smith, so that the defendant cannot produce or shew the same to the Court here), and of which last-mentioned indenture the supposed indenture in the declaration mentioned was and is the counterpart, under-demised and leased to the defendant, his executors, administrators, and assigns, all the premises with the appurtenances demised to him the said John Hutchins by the said Sir R. Sutton by the said indenture of the 1st August, 1824, to have and to hold the same to him the said defendant, his executors, administrators, and assigns, to be licensed as therein mentioned, from the 29th September then last past, for and during the term of thirty years from thence next ensuing; yielding and paying therefore yearly and every year during the said term thereby granted unto the said John Hutchins, his executors, administrators, or assigns, the yearly rent or sum of 75*l.* by equal quarterly payments: and the defendant did in the said indenture of the 17th December, 1825, covenant, promise, and agree to and with the said John Hutchins, his executors, administrators, and assigns, amongst other things, that he the defendant, his executors, administrators, and assigns, should and would well and truly pay to the said John Hutchins, his executors, administrators, or assigns, the said yearly rent or sum of 75*l.* on the days thereinbefore mentioned for payment thereof, without any deduction or abatement whatsoever. But the defendant further in fact

said that the said John Hutchins did not by the said last-mentioned indehture or otherwise reserve or retain to himself the said John Hutchins, or his executors, administrators, or assigns, or otherwise, nor had the said John Hutchins at the time of his death, *any reversion* of or in the said premises or any part thereof; and which said indenture of the 17th December, 1825, was and is the supposed assignment in the declaration mentioned: And the said John Hutchins afterwards, and before any part of the supposed sum in the declaration mentioned, and which was and is the rent reserved and made payable by the said indenture of the 17th December, 1825, became due and payable, if any such ever did become due or payable, to wit, on the 21st January, 1828, died; and so the defendant said that the plaintiff, the said Mary, did not as executrix as aforesaid take or derive, nor had she, nor has she as executrix as aforesaid any estate, &c., whatsoever of, in, or to the premises with the appurtenances so under-demised and leased by the said John Hutchins to the defendant, and so being the premises in the declaration mentioned, or any benefit, power, or right to sue upon the said covenant of the defendant for payment of the said yearly rent or sum of 75*l.* reserved by the said last-mentioned indenture, and in the said last-mentioned indenture contained, for the said sum of 243*l.* 15*s.* in the declaration mentioned, and thereby sued for, and which is stated and appears in and by the said declaration to have accrued due after the death of the said John Hutchins: And this, &c.

The plaintiff joined issue on the first plea, and demurred specially to the second, assigning for causes—That it appeared in and by the said second plea that the said supposed term of thirty years for which the said John Hutchins was therein mentioned and alleged by the indenture of the 17th December, 1825, to have under-demised and leased to the defendant the said premises, habendum

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from the 29th September then last past, was a longer time than the residue then to come and unexpired of the said term of thirty-one years therein in the said second plea mentioned to have been demised and let by the said Sir R. Sutton to the said John Hutchins by the said indenture of the said 1st August, 1824, habendum from the 25th December then last past; and therefore that the said John Hutchins did not by the said indenture of the 17th December, 1825, under-demise and lease to the defendant the said premises for the said supposed term of thirty-years from the said 29th September in the said second plea mentioned, modo et formâ; and by reason thereof the said supposed under-demising and letting by the said indenture of the said 17th December, 1825, amounted to and operated as and was in law an assignment by the said John Hutchins to the said defendant of the residue and remainder of the said term of thirty-one years of the said John Hutchins then to come and unexpired in the said premises: and also that the defendant had not in or by the said second plea denied that the said John Hutchins by the indenture of the 17th December, 1825, assigned to him the defendant the residue and remainder of the said term of years of the said John Hutchins then to come and unexpired of and in the said premises, in manner and form as the plaintiffs had in their declaration alleged; nor had he confessed and avoided the same: and also that the said second plea amounted to and was a confession of the declaration and the matters therein contained, without any avoidance of the same. The defendant joined in demur-
rer: and the case now came on for argument.

The matters of law intended by the plaintiffs to be argued, were—first, that a termor for years of premises cannot, as was alleged by the plea to have been done in the present case, under-demise and lease the same for a longer term than the residue to come and unexpired of the term of which he is himself possessed; and that a deed purporting

to be such underlease is in law an assignment of the term —secondly, that the plea demurred to neither denied any of the material allegations of the declaration nor confessed and avoided the same.

The point intended to be raised by the defendant for the consideration of the Court, was, that the plaintiffs' testator, by having granted an underlease for a term exceeding that for which he himself held the premises, parted with all transmissible interest; that, although the defendant might be estopped during the lifetime of the testator from contesting his title to make the demise, or his right to sue on the covenant as made with himself, that estoppel did not extend beyond the life of the testator; that the defendant was at liberty to shew that by the death of the testator, his immediate lessor, all his interest in the premises *ceased*; that, as there was no reversion, and the covenant to pay rent is incident to the reversion, no interest or right to sue for any rent accrued due, or any breach of covenants committed, after the death of the testator, passed to his personal representative; that the interest which created the covenant had ceased by the death of the testator, and with it the covenant itself; that the right of the personal representative to sue for a breach of covenant committed after the death of the testator, could only vest in the plaintiff as assignee of the reversion, but, there being no reversion in the testator, no right to sue had accrued to the plaintiffs; and that the averment that the interest (whatever it was) transferred by the deed set out on oyer was the supposed assignment mentioned in the declaration, was a denial of the plaintiffs' right as stated in the declaration.

Mr. Serjeant *Stephen*, in support of the demurrer.—The plea is bad in substance, and affords no answer to the action. In point of law, the deed operates as an assignment: it passes so much as Hutchins had to convey. In

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Hicks v. Downing (*a*), it was ruled that "if lessee for three years assigns his term for four years, or demises the house for four years, he does not by this gain any tortious reversion, and it does but amount to an assignment of his interest." The deed contains an express covenant on the part of the defendant that he will for a certain term pay rent: and it is perfectly clear, that, if a man assigns all his interest in lands to another, who covenants with him to pay rent, the assignor may maintain covenant notwithstanding he has no reversion. It will be contended on the other side, that rent is incident to the reversion, and therefore, that the testator, having parted with his entire term, could not sue on the covenant for rent. No doubt rent is in a certain sense incident to the reversion. *Prima facie* a grant of the reversion carries the rent. But, though incident, rent is not inseparable from the reversion (*b*). Rent may be granted without the reversion. In *Comyns's Digest* it is said (*c*): "If lessee for years assigns all his term to B., rendering rent, debt lies by the lessee for the rent *as such*, for it is not a sum in gross, though no reversion remains in the lessee." Again (*d*): "If lessee assigns his term, rendering rent to him, though the whole of the term be assigned, debt lies by the assignor upon the contract, against the assignee, his executor or administrator (*e*)." In *Newcome v. Harvey* (*f*), the plaintiff being lessee for years assigned over his whole term by indenture to the defendant, rendering rent, and an action of debt was brought for the rent in arrear. The defendant pleaded *non concessit*: and, upon demurrer to this plea, it was objected on behalf of the defendant, that the action would not lie because the sum reserved was not properly any

(*a*) Lord Raym. 99.

(*b*) Co. Litt. 93. a., 151. b.

(*c*) Com. Dig. "Debt," (C).

(*d*) Com. Dig. "Debt," (E).

(*e*) Citing *Lloyd v. Langford*,

2 Mod. 175.

(*f*) Carth. 161.

rent, but a sum in gross, the plaintiff having assigned over his whole term, and by consequence had no reversion, and therefore the action ought to have been for a sum in gross upon the contract (and not debt for rent), and that would not lie till the last day expired. To which it was answered, and so resolved by the Court, that "this is a rent, though the plaintiff has no reversion; for, if a rent is reserved upon a feoffment in fee, there is no reversion in the feoffor, but yet this is a rent, and recoverable by the name of a rent upon the contract." And in the margin is the following note: "A termor surrendered to the lessor, rendering rent, and it was adjudged that this was recoverable as rent, and that it was not a sum in gross." In *— v. Cooper* (g), the Court said: "There are two ways of creating a rent; the owner of the land either grants a rent out of it, or grants the land, and reserves the rent: there is no such thing as a rent-seck, rent-service, or rent-charge issuing out of a term for years (h). If a man hath a term for years, and grants all his estate of the term, rendering certain rent, he cannot distrain if the rent be in arrear; this case is law, and in point: therefore, if the avowant will recover what is owing to him from the plaintiff, *he must bring his action upon the contract.*"

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Mr. Serjeant Coleridge contra.—The question here is, whether an action of covenant will lie by the executrix of the assignor, against the assignee, who has assigned over. None of the authorities cited go the length of that position. In *Thorn v. Woolcombe* (i), a lease was granted in 1759, for ninety-nine years, if certain parties should so long live. The lessees in 1818 demised the premises to P. for sixty-two years, from the 25th March, 1821, if their interest should so long continue, subject to a rent of

(g) 2 Wils. 375.

(h) Citing Bro. Abr. "Debt," pl. 39.

(i) 3 Barn. & Adolph. 586.

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42*l.* and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release executed in 1820, to which the mortgagee was a party, P., in consideration of a sum of money (part of which went to discharge the mortgage), conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated that the purchaser should retain 300*l.* of the purchase-money, upon trust, that, if P. should pay the 42*l.* rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him the 300*l.* at the expiration of the term or extinguishment of the lease of 1759, and interest in the meantime. It was held that the deed of 1818 was an assignment of all the interest of the then lessees to P.; and that, by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage being at the same time put an end to) the term became merged in the inheritance; and consequently, that, as soon as the term became vested in the purchaser, P. was discharged from the rent and covenants, and entitled to the 300*l.* Suppose, in the present case, the defendant were evicted, the plaintiffs would not be allowed to deprive him of the remedy incident to a case of rent, by calling this a reservation of a sum of money, or a sum in gross. The question is, whether this is a reservation of rent, so as to give a right of action to the executrix. It may be conceded that rent is not inseparable from the reversion. But the *general* rule of law is, that it follows the reversion. No doubt, a rent-charge or rent-seck may be created without reference to a reversion: but this, if anything, is a rent-service: and it is like an attempt to reserve a rent to a stranger, which cannot be (*k*). The cases cited

to shew that where a lessee assigns, reserving a rent, he may sue the assignee for it, proceed upon the principle that the assignee is estopped from disputing the title of the party under whom he has occupied : but the estoppel extends not beyond the life of the assignor. In *Lloyd v. Langford* the action was brought by the assignor: here the executrix sues, and she, coming in as a stranger, is not entitled to maintain the action.

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Mr. Serjeant *Stephen*, in reply.—*Thorn v. Woolcombe* is distinguishable, for there the term had merged in the inheritance: here, the lessee's interest does not expire till the year 1854. This is not the case of a rent-service, which ex. vi termini supposes a reversion. Nor is it properly speaking a rent-seck, so as to be distrainable for; for, rent-seck must be issuing out of the freehold, whereas this issues out of a term of years. It is enough for the present argument to say that this is a covenant by the defendant with Hutchins, his executors and administrators, to pay them a certain annual sum. Suppose a covenant to pay a sum of money by yearly instalments, could it be doubted but that the executor of the covenantee might maintain an action upon the covenant?

Lord Chief Justice *TINDAL*.—It appears to me that the plaintiffs are entitled to recover. This action is brought upon an express covenant between Hutchins, the testator, and the defendant, who was let into possession of the land under it, by which certain premises held by Hutchins under a lease from Sir Richard Sutton for a term of thirty-one years from Christmas, 1823, were under-demised and leased by Hutchins to the defendant for the term of thirty years from the 29th September, 1825—being three quarters of a year longer than the term for which Hutchins himself held the premises—the defendant covenanting to pay yearly and every year during the said resi-

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due and remainder of the said term, unto Hutchins, his executors and administrators, the yearly sum of 75*l.* by equal quarterly payments. It is contended on the part of the defendant, that the plaintiffs, who represent Hutchins, are not entitled to recover this rent during the continuance of the term and the enjoyment of the premises by the under-lessee; and that the indenture operates as an assignment. After the authorities that have been referred to, and others that might have been cited, I think it may be conceded that this indenture does operate as an assignment. I need only refer to *Poultney v. Holmes* (*l*). There, the defendant having a term for years, whereof one year and three quarters was to come, agreed with the plaintiff that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease. The plaintiff took possession, and then brought trespass against the defendant for a re-entry. It was objected that that agreement amounted to an assignment of the lease, and was therefore void by the statute of frauds and perjuries, not being in writing: to which it was answered on the part of the plaintiff, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion. And of this opinion was Lord Hardwicke, and the plaintiff obtained a verdict. It is then asked whether this is a covenant for the payment of a gross sum or of a rent. I feel little difficulty in holding it to be a payment in the nature of rent. The cases of *Newcome v. Harvey* and *Lloyd v. Langford*, which are both adopted by Lord Chief Baron Comyns in his Digest (*m*)—a circumstance that adds considerably to their authority—shew that, where the whole term is assigned,

(*l*) 1 Str. 405.

(*m*) Title "Debt" (C), (E).

a gross sum reserved to be paid periodically to the assignor is a payment in the nature of rent; otherwise eviction would afford no answer to an action of covenant for the sum reserved: and this seems to me to give an answer to the whole argument. As to the case of *Thorn v. Woollcombe*, it amounts to no more than this, that, where a term becomes merged in the inheritance, the rent reserved to be paid during the term is extinguished—little more, in fact, than had already been decided in *Webb v. Russell*(n), where it was held, that, if a tenant for a term of years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. Here, the contract is personal; and it seems to me that there can be no objection to the maintenance of an action either by the assignor or his personal representatives (who sue, not as assignees of the reversion, but in virtue of the privity of contract) during the existence of the term.

Mr. Justice PARK.—The only doubt I entertained arose from the case of *Thorn v. Woollcombe*; but, for the reasons given by my Lord Chief Justice, I think that case distinguishable from the present.

Mr. Justice GASELEE.—I concur in the opinion expressed by his Lordship. *Thorn v. Woollcombe* was an express case of merger.

Mr. Justice BOSANQUET.—I am of the same opinion. The term being still in existence, and the rent reserved unpaid, the plaintiffs who sue as the personal representatives of Hutchins, and as such entitled to the benefit of privity of contract, and not as assignees of the reversion,

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as has been suggested, are, I think, clearly entitled to maintain this action.

Judgment for the plaintiffs.

BACHELOR and Another v. VYSE.

Friday,
May 23rd.
 Where the sheriff sells under an execution more than sufficient to satisfy the debt and costs, he is liable in trover for the excess.

Where a trader whose goods are under seizure quits his home, it is for the jury to say whether he departs with the bona fide intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors.

THIS was an action of trover brought by assignees of a bankrupt against a sheriff to recover the value of certain goods of the bankrupt alleged to have been sold under execution after the issuing of the commission. The cause was tried before Lord Chief Justice Tindal, at the Sittings at Westminster after last Hilary Term. The bankruptcy was disputed. On the part of the plaintiffs the debt and trading were proved; and, in order to establish an act of bankruptcy, evidence was given of the bankrupt's having, whilst a person was in possession of his effects under two executions, left his home and gone to London. The executions were for 763*l.*, and the sheriff sold to the extent of 1,059*l.*, being an excess of 295*l.* over and above the sums directed to be levied, and costs. No evidence whatever was offered on the part of the defendant. On the part of the plaintiffs, it was contended that trover would lie for the excess. His Lordship left it to the jury to say whether the bankrupt's motive in absenting himself from home was bona fide with the intention to endeavour to procure the means of discharging the executions, or with a view to conceal himself from his creditors. The jury found for the defendant.

Mr. Serjeant Wilde, in the last term, obtained a rule nisi that this verdict might be set aside, and a new trial had.—To shew that trover was maintainable for the excess, he cited *Stead v. Gascoigne* (*a*), where it was held, that,

if a sheriff legally take goods in execution, the proprietor whereof afterwards becomes bankrupt, and the sheriff sells at one time, after the bankruptcy (*b*), enough to satisfy both that execution and also another execution, which, being delivered to him after the bankruptcy, is void, the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution.—He also submitted that the direction of the Lord Chief Justice was rather too limited, inasmuch as the bankrupt might have gone to London for a lawful purpose, and *stayed* there with a view to avoid his creditors (*c*).

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Mr. Serjeant *Talfourd* now shewed cause.—*Stead v. Gascoigne* was but little argued ; and there is a manifest distinction between that case and the present : there, there was a broad line of demarcation between the property sold under the first execution, which was good, and that sold under the second, which was void ; whereas here the *seizure* was legal as to the whole. [Lord Chief Justice *Tindal* referred to *Norman v. Bell* (*d*), where a toll of corn had been customarily taken by dipping into the sack so as to bring out a certain quantity, and the collector varied from the proper mode (by *sweeping* instead of *lifting* the toll), so as to take more ; it was held that trover lay against him for the excess]. In that case the original act of taking was wrongful. In seizing under an execution, it is utterly impossible to determine what will be a sufficient seizure.—Then, there being no evidence of any creditor

(*b*) A sale *after* the bankruptcy has since been decided to be void as against the assignees, though the execution were delivered to the sheriff *before*—See *Balme v. Hutton*, ante, Vol. 3, p. 1, 1 Cromp. & M. 262, 9 Bing. 471,

Garland v. Carlisle, ante, p. 24, 2 Cromp. & M. 31.

(*c*) See *Cumming v. Baily*, 4 Moore & Payne, 36, 6 Bing. 363.

(*d*) 2 Barn. & Adolph. 190.

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being delayed, the bankrupt's going to London did not amount to an act of bankruptcy. In *Fisher v. Boucher* (e), where, a trader, being under apprehension of arrest, gave directions to his servant to deny him in case A., a sheriff's officer, called—it was held, that, the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge*, in support of the rule.—The action is clearly maintainable. If the sheriff has sold sufficient to satisfy the execution, and the defendant in the execution demands the rest, and the sheriff refuses to stay his hand, would he not be liable to him in trover?

Lord Chief Justice TINDAL.—The law allows the sheriff to *seize* a reasonable quantity of the debtor's goods: but he must know when he has *sold* enough to satisfy the execution. *Stead v. Gascoigne* is a direct authority. The case certainly was not much argued; but it was treated as an authority by Mr. Justice Littledale in *Norman v. Bell*. I think the case should go down to be reconsidered, on payment of costs.

Rule absolute, on payment of costs.

(e) 10 Barn. & Cress. 704.

*Monday,
May 26th.*

CURTIS and ANDREWS, Executors of JOHN CURTIS, Deceased, v. SPITTY.

Nil habuit in tenementis cannot be pleaded to a count for use and occupation, either in assumpit or debt.

THIS was an action of debt brought by the plaintiffs as executors of one John Curtis, deceased, to recover a sum of 11*l.* 14*s.*, for thirteen years' rent reserved upon an indenture of lease between John Curtis (the testator) and

one William Copping, of which lease the defendant was alleged to be the assignee. The declaration also contained a count for use and occupation. The defendant pleaded several pleas, to which there were replications and rejoinders. The ninth plea, to the count for use and occupation, stated that "the said John Curtis in his lifetime had nothing in the said messuage, &c., in that count mentioned at the time the said defendant used and occupied the same as in that count mentioned, whereof he the said John Curtis in his lifetime could suffer or permit the said defendant to have, hold, use, occupy, possess, and enjoy, as in that count mentioned." To this plea the plaintiffs demurred generally.

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The points intended to be urged in support of the demurrer were, that the plea amounted to the general issue of *nil debet*; that it did not traverse or deny any allegations in the declaration; that it did not confess and avoid the matters stated in the count to which it purported to be an answer; that issue could not be taken upon it; that it would compel the plaintiffs in answer to it to set out the whole of their title in their replication—a title already fully disclosed in the declaration; that it denied the title of the plaintiffs, under whom it admitted the defendant occupied; that it affected to be a plea of eviction, without alleging a disturbance or interruption in the enjoyment of the premises; and that it was argumentative, and attempted to put in dispute the title of the party under whom the defendant derived possession.

Mr. Petersdorff, in support of the demurrer, was stopped by the Court, who, referring to *Lewis v. Willis* (*a*) and *Cooke v. Loxley* (*b*), called on —

(*a*) 1 Wils. 314, where it was held that *nil habuit in tenementis* is a bad plea to assumpsit for use and occupation. •

(*b*) 5 Term Rep. 4, where it was held, that, in an action for use and occupation by an incumbent against a tenant of the glebe lands,

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Mr. Serjeant *Stephen* to support the plea.—Nil habuit in tenementis is a good plea in debt for use and occupation, though not in assumpsit. The question does not in any degree involve the doctrine that precludes the tenant from calling in question his landlord's title, inasmuch as this is a mere question of pleading, and not of evidence. There are two modes of declaring in debt for rent; the plaintiff may either declare on the demise, setting forth the indenture, in which case the defendant cannot plead nil habuit in tenementis, because he is estopped by the record; or he may, as here, declare in debt for the rent, without setting out the deed, in which case there is nothing to prevent the defendant from pleading nil habuit in tenementis. The plaintiff may in the latter case reply the estoppel, or go to issue on his title (c). Debt for use and occupation was a form of action known to the law before the statute 11 Geo. 2, c. 19, s. 14: at common law as-

who has paid him rent, the defendant cannot give evidence of a simonaical presentation of the plaintiff, in order to avoid his title.

(c) In debt for rent upon an indenture, if the defendant pleads nil habuit in tenementis, the plaintiff need not reply that estoppel, but may demur, because the declaration is on the indenture, and the estoppel appears on the record; otherwise if he has declared quod cum dimisisset—*Kemp v. Goodal*, 1 Salk. 277—*Speak's case*, Hob. 206. Upon a demise by indenture by one who has nothing in the land, if the lessor brings debt for rent, and declares upon the demise, and the defendant pleads nihil habuit in tenementis, if the plaintiff replies that he had a sufficient estate whereout to

make the demise, he has lost the benefit of the estoppel; but, if he replies that the lease was made by indenture, and concludes unde petit judicium if he shall plead this plea against his own acceptance of the lease by indenture, there the defendant shall be estopped; but, if the defendant had pleaded nil debet, the plaintiff might have taken advantage of the estoppel upon evidence, because the pleadings are not brought to such a point in the case as to give the plaintiff an opportunity of replying the estoppel—Per Lord Chief Justice Holt, in *Trevibas v. Lawrence*, 2 Lord Raym. 1051, 1 Salk. 276, S. C. And see to the same effect 1 Wms. Saund. 276 a, n. (1), 325, n. (4)—Selw. Ni. Pri. 8th edit. pp. 611, 1407.

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sumpsit was not maintainable for rent (*d*). But by that section—"to obviate some difficulties that many times occur in the recovery of rents where the demises are not by deed," it is enacted "that it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was to be held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered." The statute says nothing of the action of debt, which therefore rests upon its own merits (*e*). Littleton (*f*) says: "If the lessor (of a term of years) reserve to him a yearly rent upon such lease, he may chuse for to distraine for the rent in the tenements letten, or else he may have an action of debt for the arrerages against the lessee. But in such case it behoveth that the lessor be seised in the same tenements at the time of his lease; for, it is a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead. Lord Coke, in commenting on this section, says (*g*): "The reason of this is, for that in every contract there must be quid pro quo, for, contractus est quasi actus contra actum; and therefore, if the lessor hath nothing in the land, the lessee hath not quid pro quo, nor any thing for which he should pay any rent. And in that case he may also plead that the lessor

(*d*) Because the claim of rent savoured of the realty—1 Rol. Abr. 7, (O) pl. 1, 2.

(*e*) See *Egler v. Marsden*, 5

Taunt. 25.

(*f*) Section 58.

(*g*) Co. Litt. 47 b.

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non dimisit, and give in evidence the other matter. If the lease be made by deed indented, then are both parties concluded; but, if it be by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made." In *Gill v. Glasse* (*h*) the form of plea here used actually occurs. In *Naish v. Tatlock*, Lord Chief Justice Eyre says (*i*): "The action for use and occupation is in its own nature collateral to the action on a contract for rent upon a demise, and it was so holden in the case of *Johnson v. May* (*k*): if the defendant did in fact use and occupy by the permission of the plaintiff, and had expressly promised to pay, though the plaintiff had no title, or perhaps an equitable title only, the action lay." Whatever is true of the action of debt at common law is equally true of debt for use and occupation. Lord Ellenborough, in *King v. Fraser*, says (*l*): "When it was once established, as in *Stroud v. Rogers* (*m*) and *Wilkins v. Wingate* (*n*), that debt for use and occupation would lie, it necessarily followed that the generality of the form of declaring for use and occupation in every respect might be adopted." From these authorities it is clear that the plea in question is unexceptionable.

Lord Chief Justice TINDAL.—Admitting for the purpose of argument that a plea of nil habuit in tenementis may be put upon the record in an action of debt for rent, still that form of action differs materially from the present. In debt for rent, the plaintiff must allege a demise. This action, however, is founded on a by-gone consideration, viz. the enjoyment of the premises for which the defendant has contracted to pay: the contract is perfectly collateral to a claim for rent under a demise. The plea of nil habuit

(*h*) Yelv. 227.(*i*) 2 Hen. Blac. 324.(*k*) 3 Lev. 150.(*l*) 6 East, 351.(*m*) Cited in a note to *Wilkins v. Wingate*.(*n*) 6 Term Rep. 62.

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in tenementis therefore appears to me not to apply. Such was the opinion of the Court in *Lewis v. Willis*, where it was held that nil habuit in tenementis was a bad plea to an action on the case for use and occupation. The Lord Chief Justice there says: "This is a bad plea to an action upon the case for the use and occupation, and so it was determined in the case of *Richards v. Holditch*, Hilary, 18 Geo. 2; but, in debt for rent upon a lease not indented, this plea may be pleaded, because an interest passes by a lease." Here, the form of action is, debt for use and occupation—a form of action known to the common law, and frequently resorted to for the purpose of avoiding the difficulties attendant on the action of debt for rent on a demise. Assumpsit for use and occupation was also a well-known form of action, which is still maintainable where the rent is not claimed by virtue of an indenture under seal. The statute 11 Geo. 2, c. 19, merely extends the remedy of the landlord, by enabling him to sue in an action on the case notwithstanding the existence of a written agreement, not being by deed. But, why are we to say that an action of debt will not equally lie at common law upon the same contract. The actions of debt and assumpsit have long been put by all the Courts upon the same footing. This appears from *Stroud v. Rogers*, confirmed by *Wilkins v. Wingate*, *King v. Fraser*, and *Egler v. Marsden*. These two forms of action having been so long considered co-extensive, it would be somewhat singular now to hold a plea that is confessedly not good in the one form of action, good in the other. The same principle has also been applied to a replevin; for, in *Sullivan v. Stradling* (o), it was held that nil habuit in tenementis is no plea in bar to an avowry under the statute 11 Geo. 2. On these grounds I think the plea cannot be supported, and consequently that there must be judgment for the plaintiffs.

(o) 2 Wils. 208.

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Mr. Justice PARK.—It is admitted that this would have been a bad plea in an action of assumpsit. I confess I cannot see the distinction that has been contended for. As soon as it was established that debt would lie for use and occupation equally with assumpsit, it seems to me that all the consequences attending the one form of action must also attend the other. All the cases on the subject for a period exceeding forty years have been uniform. It has been suggested that assumpsit for use and occupation is the creature of the statute. But that is not so: instances of that form of action being resorted to are to be found in Rolle's Abridgment. The statute was only intended to make certain that remedy which had before been doubtful. In Selwyn's Nisi Prius (*p*), it is said: "Formerly an action of assumpsit for rent arrear upon a parol lease for years could not have been maintained, either pending or after the expiration of the term, because it was considered as a real contract: the only remedies were by distress or action of debt. But, on a mere promise to pay a sum of money, or so much as the plaintiff deserved to have, in consideration of the plaintiff's permitting the defendant to occupy lands, &c., an action of assumpsit might have been maintained by the common law." In the case of a demise not by deed, the action of debt for use and occupation has also been substituted for the antient method of declaring in debt for rent. The first case in which it was determined that an action of debt might be maintained for use and occupation, was that of *Stroud v. Rogers*, which was supported by Lord Kenyon in *Wilkins v. Wingate*, and has been uniformly acted upon from that time to the present. It therefore seems to me, that, when it is established that *nil habuit in tenementis* is a bad plea in assumpsit for use and occupation, it follows that it is equally a bad plea in debt for use and occupation, the latter

form of action being subject to all the incidents of the former.

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Mr. Justice GASELEE.—In early times, it seems to have been necessary, in declaring in debt on a demise by indenture, to state the indenture; for, where the demise was not stated to be by indenture, the defendant might plead *nil habuit in tenementis*, and the plaintiff was bound to reply the indenture by way of estoppel, or to shew specially what title he had in the premises. *Lewis v. Willis* decided that *nil habuit in tenementis* is no plea to a declaration in *assumpsit* for use and occupation. I think we are bound to apply to debt for use and occupation the same principles as before the statute applied to *assumpsit*.

Mr. Justice BOSANQUET.—I am of the same opinion. The principle that a tenant shall not be permitted to dispute the title of the landlord under whom he has held, is not founded upon the statute 11 Geo. 2, but is the result of the decisions of the Courts in actions founded upon that statute. It is true the statute only applies to *assumpsit*, but the Courts have since held debt for use and occupation to stand upon the same footing with *assumpsit*. When therefore it has been decided, that, when the plaintiff declares in the form given by the statute, the defendant shall not dispute the plaintiff's title by pleading *nil habuit in tenementis*, it follows that the plea is equally inapplicable to a declaration in debt for use and occupation: the same principles applying to both forms of action.

Judgment for the plaintiffs.

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Thursday,
May 28th.

Service of a declaration in ejectment on the daughter of the tenant in possession is not good service, unless it be shewn to have come to the hands of the tenant.

Doe d. BRITTLEBANK v. Roe.

MR. CLARKE moved that the service of the declaration and notice in ejectment might be deemed good service. The affidavit upon which he moved stated that the declaration and notice had been served upon the daughter of the tenant in possession upon the premises, and the nature and intent thereof explained to her; and that the tenant had absconded to avoid her creditors, and had been absent some months.

It not appearing that the declaration had ever come to the hands of the tenant—

Clarke took nothing (a).

(a) See *Doe d. Thomas v. Roe*, ante, Vol. 1, p. 435, and *Doe d. James v. Roe*, Id. 597.

Friday,
May 30th.

P., N., and the plaintiff occupied successive-ly premises un-der a lease that had been grant-ed in 1809, by parties having no right to make a lease. The defendant in 1827, became possessed of the fee. In the years 1829 and 1831 respec-tively, the de-fendant distrained on P. and on N. for arrears of rent, which they paid:—Held, that these pay-ments amounted to such an acquiescence by P. and N. in the title of the defendant, that they and those deriving possession from or under them were estopped from disputing it; and this although the defendant himself produced in evidence the lease of 1809, and failed to shew that it had been assigned to him.

COOPER v. BLANDY and Another.

THIS was an action of replevin. The defendant Blandy avowed for rent in arrear from the plaintiff as tenant to him under a demise of the premises at the yearly rent of 60*l.* The other defendant made cognizance as bailiff of Blandy: and both defendants also made cognizance as bailiffs of one Mansell. The plaintiff pleaded non tenuit.

The cause was tried before Lord Chief Justice Tindal, at the Sittings in London after the last Hilary Term. The premises in question, which were situate in Fetter Lane,

defendant distrained on P. and on N. for arrears of rent, which they paid:—Held, that these pay-ments amounted to such an acquiescence by P. and N. in the title of the defendant, that they and those deriving possession from or under them were estopped from disputing it; and this although the defendant himself produced in evidence the lease of 1809, and failed to shew that it had been assigned to him.

were in 1799 conveyed by a marriage settlement to Barclay and Alexander as trustees of Mansell and wife. In 1809, Mansell and wife granted a lease of the premises to one Nelson, for a term of thirty-one years. In the year 1829, one Perry was in possession as tenant to Nelson. In the course of that year Perry quitted, and one Nightingale became tenant. And in 1831, the plaintiff succeeded Nightingale. In 1827, the defendant Blandy became possessed of the freehold under a conveyance made, in pursuance of a decree of the Master of the Rolls, by Barclay and Alexander, subject to an equitable mortgage to Messrs. Praed & Co. Mansell and wife were both dead in 1825.

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In order to establish his title, the defendant Blandy proved that in the year 1829 he distrained on Perry twice for arrears of rent of the premises, on both which occasions the rent was paid by him; and that, in 1831, he likewise distrained on Nightingale, and the rent was paid by him. He then gave in evidence the deed of 1827, by which the fee was conveyed to him, and also the lease of 1809; whereupon it was contended on the part of the plaintiff that the defendant ought further to have shewn an assignment of that lease to himself, for that the existence of the remainder of the term therein in another person was not inconsistent with Blandy's right to the fee, and that the payments in respect of rent by Perry and Nightingale were only made in affirmation of that lease.

His Lordship thought, that, inasmuch as Perry and Nightingale had acknowledged the title of Blandy, by paying rent to him under distresses, neither they nor any person claiming under them could call in question Blandy's title. The jury accordingly found for the defendants.

Mr. Serjeant Atcherley, in the last term, in pursuance of leave reserved, obtained a rule nisi to enter a verdict for

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the plaintiff on the ground urged at the trial. He cited *Rogers v. Pitcher* (*a*).

Mr. Serjeant Merewether and Mr. Cowling now shewed cause.—It appearing that Perry and Nightingale both acknowledged Blandy for their landlord, by paying rent to him after distresses, and that the present plaintiff came in under Nightingale, as Perry and Nightingale were by their own act of acquiescence estopped from disputing Blandy's title, so also is the plaintiff. When these facts were proved, enough was shewn to entitle the defendants to the verdict. The documentary evidence was superfluous and irrelevant. The general rule is indisputable, that one who acknowledged a party to be his lawful landlord cannot afterwards dispute his right. It is true, the tenant may shew that the title of his landlord has expired, and that another person has acquired title, and that that other has asserted a claim to the premises. In *Rennie v. Robinson* (*b*), where A. hired apartments by the year of B., and B. afterwards let the entire house to C., who sued A. in an action for use and occupation, for the hire of the apartments; it was held that A. could not impeach C's title. The case of *Doe v. Parker* (*c*) is expressly in point. That was an action of ejectment brought by the lessor of the plaintiff to put an end to a lease granted by one Mrs. Parkes to the defendant for twenty-one years, determinable at the end of fourteen years by Mrs. Parkes or her assigns, on giving six months' previous notice to quit. The lease being put in, and a notice by the lessor of the plaintiff being proved, it was objected by the defendant's counsel that the lessor of the plaintiff should produce some deed of assignment from Mrs. Parkes. But, it appearing that the defendant had paid rent to him, Lord Kenyon said that was sufficient

(*a*) 6 Taunt. 202, 1 Marsh. 541. (*c*) Peake's Evid. 4th edit., p.

(*b*) 1 Bing. 147, 7 Moore, 539. 304.

evidence of an assignment, and of the defendant being his tenant. With respect to the case of *Rogers v. Pitcher*, all that the Court there decided was, that, where rent has been paid under a mistake, or in consequence of misrepresentation, the party paying it is not precluded from shewing that by evidence.

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Mr. Serjeant *Atcherley* and Mr. *Kelly*, in support of the rule.—In order to support the avowry, it was necessary to shew that the plaintiff came in under the lease of 1809, and that Blandy was the assignee of that lease. Now, instead of this, it appeared that Blandy claimed, not under Mansell and wife, the lessors, but by title paramount, by a conveyance of the fee from the trustees. Suppose a distress to be made by Mansell and wife, the plaintiff holding under the lease of 1809, could he set up in answer the title of Blandy? It is said that Perry and Nightingale have acknowledged Blandy's title by paying rent to him; and that such payments, being evidence against them, also bind the present plaintiff, as coming in under them, and consequently taking the same liability. Undoubtedly, payment of rent is *prima facie* evidence of title in the payee. But it is only *prima facie* evidence. Payment of rent *per se* works no estoppel; the estoppel is by accepting possession from the party. In *Rogers v. Pitcher*, it was held, that, in replevin, proof of payment of rent to the avowant is *prima facie* evidence that he is the owner of the land: but, in a case where the plaintiff did not originally receive the possession of the land from the avowant, it is competent to the plaintiff to rebut the title of the avowant by shewing that he paid rent under circumstances which did not entitle the avowant to the rent. Lord Chief Justice Gibbs there says (*d*): “The same doctrine

(d) 6 *Taunt.* 208.

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which I now lay down was held by Mr. Justice Bayley in an ejectment at Shrewsbury for cottages for which rent had been paid to the corporation: the payment of rent was certainly *prima facie* evidence of their title (*e*). My Brother Bayley held that the defendants having disclaimed to hold under the corporation, that was equivalent to a notice to quit, and left them at liberty to shew who was the real proprietor of the soil. This doctrine must be taken with reference to the subject-matter, and to the case in which it is laid down. It was not a case in which the tenants had been originally let into possession by the corporation: *if it had been, I should have thought the defendants never could have disputed the title of the corporation while they continued in possession*: but these cottages were built on the waste, and the corporation claimed to be lords of the manor, and claimed rent; and the tenants, who had at first acquiesced, being afterwards advised of other landlords, disclaimed to hold of the first." All the authorities shew that the doctrine of estoppel goes this length only—the tenant is precluded from disputing the landlord's title, where he or those under whom he claims have come in under the landlord or under those under whom he claims. Estoppel only exists between parties or privies in contract: and here there is no privity of estate between the plaintiff and Blandy, nor was the latter any party to the contract under which the former derived possession of the premises. In *Fenner v. Duplock* (*f*), it was held that payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of

(*e*) See the judgment of this Court delivered by Mr. Justice Park in the case of *Gravenor v. Woodhouse*, 1 Bing. 38, 7 J. B. Moore, 289. (*f*) 2 Bing. 10, 9 J. B. Moore, 38.

payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired.

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Lord Chief Justice TINDAL.—I am unable to perceive any sufficient ground to exempt this case from the ordinary rule that obtains in the law relating to landlord and tenant, viz. that the tenant is estopped from disputing the title of the landlord under whom he has occupied. The avowry stating rent to be due from the plaintiff for two years and a half of premises held by him as tenant to the defendant Blandy, it is manifest that all that the defendants had to prove was that the plaintiff was actually tenant to Blandy at a certain rent, and that the rent was in arrear. It is perfectly immaterial whether the tenancy was under a lease or from year to year. The defendants might at the trial have confined their case to proof of the fact that Perry and Nightingale occupied the premises in question from 1827 to 1831, and paid rent to him, and that the plaintiff came into possession under Nightingale. The law would then have implied that the plaintiff was tenant from year to year of the premises. That being the state of facts, the authorities are clear, that a payment of rent by Perry and Nightingale under distress amounted as against them to such an admission of a tenancy under Blandy that they could not set up the title of another person; neither could any person who might subsequently come in under them. The objection arises from the circumstance of the landlord having gone further than he need have done—having put in the lease of 1809—by which, it is contended, he has shewn that he is not entitled to the rent in question. That lease purported to be made by Mansell and wife, whereby they demised the premises in question to Nelson for the term of thirty-one years. It is said that the payment of rent by Nightingale and by Perry must be understood as being in affirmation of that lease; and that the defendant Blandy having put

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in the lease must go further, and prove an assignment of the reversion thereof to himself. Undoubtedly the payment of rent by Nightingale and Perry was in affirmation of the lease; but still it was not necessary for Blandy to shew that it had been assigned to him. The payment of rent by those persons was *prima facie* evidence of an admission of his title as landlord. Why are we to presume anything in favour of persons who have thought proper to pay rent to Blandy on the assumption that he had title? or, why are we to call on him to shew that he has the reversion? In *Rogers v. Pitcher* it was held, that, where the plaintiff did not originally receive the possession of the lands from the avowant, it was competent to the plaintiff to rebut the title of the avowant by shewing that he paid rent under circumstances which did not entitle the avowant to receive it. But here it is not pretended that any other person has set up any claim to the premises; and yet the Court are called upon, after Blandy's title to the rent under the lease of 1809 has been admitted by two successive tenants, under the latter of whom the present plaintiff has been led into possession, to presume that he has no title. Before we come to that conclusion, I think it should at least be shewn that some third person has set up a claim as landlord of the premises. So far, however, from that being the case, there was evidence to shew that the rent had been regularly assigned to Blandy: deeds of lease and release were put in, executed in 1827, whereby the fee was conveyed to him. Upon the evidence, therefore, the plaintiff must necessarily have been dealing with Blandy as the assignee of the lease of 1809; or, the lease being made by persons having no title, Nightingale and Perry must have held as tenants from year to year under Blandy. I therefore think that the plaintiff was bound both in law and in justice to pay the rent to Blandy, and consequently that the verdict that has been found for the defendants ought to stand.

Mr. Justice PARK.—I am of the same opinion. The argument on the part of the plaintiff turns on a fallacy. The general rule of law is, that a tenant shall not dispute his landlord's title, or call upon him to establish it: it would be very hard if it were otherwise, many titles resting on possession only. No doubt there are exceptions to this rule: such are the cases of *Rogers v. Pitcher* and *Fenner v. Duplock*. In those cases the lessee's title had expired: whereas here the title of the landlord has been admitted by successive tenants, by payment of rent to him, no other person appearing to claim any interest in the premises. Perry and Nightingale never had any other landlord than Blandy; and the present plaintiff comes in under Nightingale. Under these circumstances, the defendants might have rested their case upon the bare fact of payment of rent. The deeds were perfectly unnecessary, and need not have been produced at all. There appear to have been three several distresses put into the premises by Blandy, two in Perry's time and one in Nightingale's: and these distresses were acquiesced in, and the rent paid. The case of *Panton v. Jones* (g) seems to me to be expressly in point. There, the defendant had never paid rent personally to the plaintiff, and she did not give strict evidence of title; but it was proved, that, in January, 1811, the defendant being in possession of the premises, she distrained on his goods for 39*l.* 18*s.*, stated to be arrears of rent then due from him to her as his landlady. He did not replevy, and the goods were sold to satisfy the rent. It was contended on behalf of the defendant, that payment under the distress was no acknowledgment of a tenancy by the party submitting to it. But Mr. Justice Bayley said: "I have no doubt that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if

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he does not replevy, I think, is precluded from denying the title of the landlord." Although that is only a *Nisi Prius* decision, I entirely agree with the doctrine there stated; and I am most happy, that, in deciding in accordance with it on the present occasion, we shall be not only giving effect to the law, but also advancing the justice of the case.

Mr Justice GASELEE.—The simple question is, whether or not the plaintiff has occupied the premises in question as tenant to the defendant Blandy. It seems to me that the facts that were given in evidence at the trial fully established the affirmative of that issue. It appears that in 1827 Blandy became seised of the freehold. At that time Perry was tenant of the premises. Perry was succeeded by Nightingale, and Nightingale by the present plaintiff. Perry and Nightingale both paid rent, after distresses had been put in by Blandy. This shews a *prima facie* case of title in Blandy, and precludes all the parties so holding from disputing it. The only difficulty in the case has arisen from the production of the lease of 1809; made by Mansell and wife, who (the legal estate being vested in their trustees) had in law no right to grant a lease. It appears that the trustees never interfered, probably because the rent had been regularly paid to Mansell and wife. Since the conveyance of 1827, there is no evidence of any claim to the rent in question being set up either by Mansell and wife or any other person; and whether the plaintiff be considered as holding from year to year, or under the lease, is of no consequence. I see no reason for disturbing the verdict.

Mr. Justice BOSANQUET.—I am of the same opinion. It is admitted that the plaintiff stands in the same situation that Nelson, the original lessee, stood in. Perry and Nightingale came in under Nelson, and the plaintiff under

Nightingale. The two former, it appears, paid rent to Blandy under distresses. Now it is clear that submitting to a distress amounts to an acknowledgment of a tenancy under the distrainor. Whether the tenancy be for one year or more is not evidenced by the distress: but an acquiescence in the distress admits the tenancy and the amount of rent. To this general rule there are undoubtedly exceptions. This, however, is not a case within any of the admitted exceptions: it is not a case where the title has expired, or where it has been acquiesced in through mistake or in consequence of misrepresentation. Neither is any adverse claim set up. It is merely the case of a tenant seeking to pick a hole in the title of the party under whom he has occupied. But it is contended, that, admitting the general rule to be as I have stated, admitting that the plaintiff might have been estopped from producing any evidence to shew a want of title in his landlord, the defendant Blandy has by his own act in producing the lease of 1809, and not shewing any assignment to himself, exposed his defective title. The lease, however, that gives rise to this objection, besides being unnecessary to the defendants' case, appeared to be one which the lessors had no power to make. If therefore the lease be good for nothing, it is out of the case, and the objection falls to the ground. At all events the payments of rent under the distresses by Perry and Nightingale fully established their liability as tenants to Blandy, and consequently the plaintiff's. In *Panton v. Jones*, Mr. Justice Bayley speaks of the estoppel created by the distress as being reciprocal. He says: "The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

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Rule discharged (h).

(h) And see *Doe d. Manton v. Austin*, ante, Vol. 2, p. 107, 9 Bing. 41, and *Fleming v. Gooding*, ante, p. 455, 10 Bing. 549.

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The defendants hired a ship for a voyage to the East Indies and back ; the freight for the homeward cargo to be 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton ; the fore cabin to be filled with lightgoods, and one hundred tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel and keep her in proper trim for the voyage. The defendants in pursuance of the charterparty shipped one hundred tons of rice, and completed the cargo with light goods, in consequence of which the master was compelled to ship a large quantity of stone ballast to enable the vessel to sail safely — Held, that the defendants were at liberty, after shipping the hundred tons of rice, to complete the cargo with such goods as they thought fit, and were not bound to pay freight for the tonnage occupied by the additional ballast.

IRVING v. CLEGG and Another.

THIS was an action of covenant in which the plaintiff declared upon the following charterparty :—

“ London, Nov. 15th, 1831.

“ It is this day mutually agreed between John Irving, owner of the good ship or vessel called the Eliza, of the burthen of three hundred and twenty tons or thereabouts, now lying at Bristol, and Messrs. James Clegg & Co., of London, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall take in and receive all such lawful goods as may be sent alongside, but not exceeding three hundred tons of dead weight, and, being so loaded, shall proceed therewith to Batavia, and there, or at Sourabaya, discharge the same, and, being unloaded, shall, at a port or ports in Sumatra or Java, both or either, load a full and complete cargo of merchandize, the fore cabin or dining-room included to be filled with light goods, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture ; and, being so loaded, shall therewith proceed to Deal for orders whether to discharge at London, Rotterdam, or Antwerp, or so near thereunto as she may safely get, and deliver the same on being paid freight for the outward cargo 300*l.*, and for the homeward cargo at and after the rate of 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton, net weight at the king's beam ; the tare of the sugar not to exceed six per cent. ; for all other goods except those already mentioned, to be in just and fair proportions according to the East India Company's scale of tonnage ; restraints of

princes and rulers during the said voyage always excepted. The cargo to be sent alongside and taken from alongside the said vessel at the expense and risk of the said freighters: The freight to be paid on unloading and right delivery of the cargo, as follows:—500*l.* on clearing the vessel out at the Customs, on account of the outward and homeward freights, and the residue in good and approved bills at sixty days from the vessel's reporting inwards: seventy-five running days are to be allowed the said merchants (if the ship is not sooner dispatched) for loading the said ship at Batavia and Java, and on loading at the ports of loading in Java or Sumatra, and unloading at the port of discharge, and fifteen days on demurrage over and above the said laying days, at ten guineas per day. Penalty for nonperformance of this agreement 1,000*l.* The master to be advanced what money he may require for the ship's disbursements in India and in Europe on his return, free of interest and commission; and no commission to be charged in India or Europe in respect to the loading or unloading of the ship. And for the true performance of all and several the covenants, provisoies, and agreements herein contained, the said parties do severally bind and oblige themselves their and each of their several and respective executors, administrators, and assigns, especially the said owner and master his said ship or vessel, her freight and appurtenances, and the said freighters bind the goods, wares, and merchandize to be laden on board the same, reciprocally unto each other in the penal sum aforesaid. *One hundred tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel and keep her in proper trim for the voyage.* The charterers to have permission to send a supercargo, he finding all extra provisions and stores."

The breach assigned was, that the defendants did not nor would load or ship on board the said vessel a full and complete cargo of merchandise, according to the tenor and

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effect of the said charterparty and their promise and undertaking, either at the said port called Sourabaya or at any other port or ports in Sumatra or Java; but wholly refused and neglected so to do, and, on the contrary thereof, the defendants loaded and shipped on board the said vessel a small and insufficient cargo, being less than a full cargo by divers, to wit, one hundred tons, and wholly neglected and refused to make up the deficiency in the said cargo, or to ship any more merchandize on board the said vessel, either at the said port called Sourabaya or at any other port or ports in Sumatra or Java: by means whereof the plaintiff lost and was deprived of a large sum of money, to wit, the sum of 500*l.*, for freight, which might and otherwise would have accrued to the plaintiff if the defendants had loaded on board the said ship such a cargo as they ought to have loaded according to the terms of the said charterparty.

At the trial before Lord Chief Justice Tindal, at the Sittings in London after the last Hilary Term, it appeared that the defendants had in pursuance of the charterparty put on board one hundred tons of rice previous to any other part of the loading; but, in completing the stowage, had shipped so great a proportion of pepper that the master was compelled to take in thirty-six tons of stone ballast to put the vessel in proper trim for the voyage: whereupon it was contended, on the part of the plaintiff, that, according to the terms of the charterparty, the defendants should have so assorted the cargo, by taking in a larger quantity of heavy goods, as to render the stone ballast unnecessary. A verdict was taken for the plaintiff for 130*l.*, on a count for demurrage, and leave was reserved to the plaintiff to move to increase it by 380*l.*, the amount of freight at 4*l.* 15*s.* per ton, which would have been earned by the vessel had the defendants shipped, as it was contended they ought to have done, eighty tons of goods in lieu of the ballast.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi accordingly.—He cited Abbott on Shipping (*a*) ; and *Wallace v. Small* (*b*), where by a charterparty the defendant covenanted to ship a full and complete cargo according to the usual and customary manner at Calcutta, and he shipped a full cargo, but with so large a proportion of heavy goods that the ship was improperly burthened beyond her tonnage: and Lord Tenterden left it to the jury to say whether the defendant was justified in so loading the vessel, and they gave damages for the excess.

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Mr. Serjeant *Spankie* and Mr. Serjeant *Coleridge* shewed cause.—It may be conceded, that, if there be any usage as to loading at the port of shipment, although the charterparty be silent on the subject, such usage must be complied with. Such was the case of *Wallace v. Smith*. Here, however, there was no evidence of any usage: the charterparty stipulates that the freighters shall ship one hundred tons of rice or sugar previous to any other part of the loading. Beyond that, there is nothing to restrain the defendants from shipping the other goods mentioned in the charterparty in such proportions as they may think fit. In *Moorsom v. Page* (*c*), where by a charterparty the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid: it was held, that, having supplied as large a quantity of tallow and hides as the master chose to take on board, he was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she might have done. A general view of the operation of charterparties, as to this point, is taken in Abbott on Ship-

(*a*) 5th edit. p. 277.

(*b*) Not reported as to this point.

(*c*) 4 Campb. 103.

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ping (*d*). *Hunter v. Fry* (*e*) and *Benson v. Schneider* (*f*) will probably be relied on on the part of the plaintiff. In the former of these cases, the ship was described in the charterparty as being of the burden of two hundred and sixty-one tons, and the freighter covenanted to load a full and complete cargo—it was held that the loading of goods equal in number of tons to the tonnage described in the charterparty was not a performance of the covenant, but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety: and in the latter, where a practice prevailed of compressing bales of cotton wool, by machinery, to improve their stowage, the furnishing a cargo of cotton wool in uncom-pressed bales, as they came from the grower, was held not to be a compliance with the contract to load a full and com-plete cargo. Neither of these cases can therefore apply to the present.

Mr. Serjeant *Wilde* and Mr. Serjeant *Talfourd*, in sup-port of the rule.—It is apparent from the charterparty that the ship was intended to be made available for freight to the full extent of her capacity; and that heavy goods, viz. rice and sugar, were to be the only ballast, and the remainder of the cargo so assorted as to enable the ship to come home in safety. In *Moorsom v. Page* there was no stipulation that goods should supply the place of ballast.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judg-ment of the Court:—The question whether the *Eliza* has been loaded with a full and complete cargo upon her

(*d*) 5th edit. p. 277. And see (*e*) 2 Barn. & Ald. 421.
Roccus de Navibus et Naulo, (*f*) 1 Taunt. 272, 1 J. B. Moore,
notes, 72 to 75. 21.

homeward voyage, appears to us to depend upon the construction which is to be put upon the terms of the charterparty itself; for, as to any customary mode of loading upon the voyage described in the charterparty, none such is either referred to by the charterparty, nor is any such found by the jury. Now, looking to the terms of the charterparty alone, it appears to us, that, if it had not been for the insertion of the stipulation at the end, this case would have been governed by the decision in *Moorson v. Page*; and that it would have been clear, that, under the agreement by the freighter to furnish a full and complete cargo of merchandize, with the subsequent enumeration of the rate of freight for sugar, coffee, rice, pepper, "and all other goods," the freighter would be at liberty to load the ship with whatever goods and in whatever proportion he thought proper, and that the loss of freight, if any loss arose from the necessity of putting ballast into the ship, would be a loss that must fall on the owner. But the question arises upon the stipulation at the end of the charterparty, by which the merchant undertakes to ship one hundred tons of rice or sugar previous to any other part of the lading, "to ballast the vessel and keep her in proper trim for the voyage:" and the question is, whether, under this stipulation, the freighter is bound to make up a full cargo of other articles in such proportions that freight shall be payable for the whole tonnage of the ship, or whether he may load a full cargo of the lightest commodities, and, if any ballast is then wanting, it must be put in by the master, and occasion pro tanto a loss of freight. And we think the latter is the true construction of the agreement. In the first place, because it is consistent with the very terms employed by the parties; and it is some violence to those terms to hold them to extend to one hundred and thirty-six tons, or to any other quantity that might be found necessary to ballast the ship. If the parties had intended so uncertain a quantity, we think they would

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have expressed themselves to that effect. In the next place, because it is the duty of the owner to find proper ballast for the ship, in order to make her trim for the voyage: the agreement in question, therefore, is an agreement made for the benefit of the owner, as it relieves him from so much of the obligation as is usually thrown upon him, and insures him a freight for what would otherwise be unproductive. But it leaves the owner still liable to that obligation except so far as the special agreement will extend, which here, by the very terms of it, is, to one hundred tons only. We therefore think, that, for ballast that was necessary beyond this, the owner is bound to supply it, and that the freighters have not stipulated in any way that they will pay freight for the tonnage of such additional ballast; or, in other words, that they were at liberty to select a full and complete cargo out of such articles as they pleased, after first putting in the one hundred tons of rice for ballast.

Rule for increasing the damages discharged.

*Monday,
June 2nd.*

By s. 75 of the
statute 4 Geo. 4,
c. 60, for the re-
gulation of pri-
sons, &c., all
actions brought
in respect of
any thing done

in pursuance of the act, are directed to be laid and tried in the county where the facts were committed. In an action on the case against the sheriff of Surrey and the keeper of the county prison for having without reasonable or probable cause confined the plaintiff, a debtor, in a felon's cell—the defendants not having acted in obedience to the 6th regulation in the 10th section of the act, which requires the keeper to obtain the sanction of the visiting magistrates for any deviation from the classification of prisoners thereby prescribed—*Quære* whether they were entitled to the benefit of the 75th section. But, it appearing that the venue had originally been laid in London, that a rule nisi (never made absolute) had been obtained by the defendants for changing it to Surrey, and that the plaintiff had made a rule absolute (unopposed) for bringing it back on special circumstances:—Held, that the objection that the cause was not tried in the proper county could not afterwards be urged.

FURNIVAL v. STRINGER and Another.

THIS was an action on the case brought against the defendants, the sheriff of the county of Surrey, and the gaoler of Horsemonger-Lane Gaol, for having without any reasonable or probable cause removed the plaintiff, a

debtor confined in the prison, from that part of it which is assigned to debtors, and placed him in a cell on the felons' side.

The cause was tried before Lord Chief Justice Tindal at the Sittings in London after last Hilary Term. The defence set up was, that one of the turnkeys had informed the gaoler that he had received an anonymous communication apprising him that the plaintiff meditated an escape from prison, whereupon the gaoler, by the direction of the sheriff, caused him to be confined in the place described, in order to prevent him from carrying his intention into effect. It appeared that the plaintiff had formerly made his escape from a French prison, where he had been confined for debt: but no evidence whatever was offered as to the precise nature of the communication said to have been made to the turnkey, or the source whence it was received. It further appeared that the sheriff had laid the matter before the visiting magistrates, who conceived they had no authority over prisoners confined for debt, and therefore declined to interfere, and the plaintiff was still kept in the cell.

It was left to the jury to say whether or not the defendants had reasonable and probable cause to believe that the plaintiff meditated an escape, or was refractory; and they were told that if they thought the affirmative was made out by the evidence, the defendants were entitled to a verdict; if otherwise, they were to find for the plaintiff. The jury returned a verdict for the defendants.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi for a new trial, on the ground that the verdict was not warranted by the evidence.

Mr. Serjeant *Spankie* and Mr. *Thesiger*, before shewing cause, objected that the transaction took place in Surrey, and the cause was tried in London; whereas the 75th section of the 4 Geo. 4, c. 60, the act for regulating

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gaols and houses of correction, provides that all actions, suits, and prosecutions to be commenced against any person for any thing done in pursuance of the act, shall be laid and tried in the county where the facts were committed.—No principle is more completely recognized than this—that, where a party claims the protection of an enactment of the above description, it is sufficient if in doing the act complained of he was acting bona fide in what he conceived (though erroneously) to be the exercise of his public duty; it is not necessary that he should be acting rightly in omnibus, for then he would not need the protection—*Irving v. Wilson* (a), *Weller v. Toke* (b), *Straight v. Gee* (c), *Graves v. Arnold* (d), *Morgan v. Palmer* (e), *Cook v. Leonard* (f), *Edge v. Parker* (g), *Beechy v. Sides* (h), *Smith v. Shaw* (i), *Butler v. Ford* (k), *James v. Saunders* (l). [Lord Chief Justice *Tindal*.—The defendants must shew that the statute authorises the course pursued by them, otherwise they are not within its protection. They must be shewn to have been acting in pursuance of the statute, though they may have mistaken the course. Now, the 6th regulation in the 10th section of the statute contains directions for the classification of prisoners, “ Care

- (a) 4 Term Rep. 485.
- (b) 9 East, 364.
- (c) 2 Stark. 445.
- (d) 3 Camp. 242.
- (e) 2 Barn. & Cress. 729, 4 Dow. & Ryl. 283.
- (f) 6 Barn. & Cress. 351, 9 Dow. & Ryl. 339.
- (g) 8 Barn. & Cress. 697, 3 Man. & Ryl. 365.
- (h) 9 Barn. & Cress. 806, 4 Man. & Ryl. 635.
- (i) 10 Barn. & Cress. 277.
“ A thing is to be considered as done in pursuance of the act, when the person who does it is acting honestly and bona fide, either un-

der the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties, yet, if he acts bona fide in order to execute such powers or to discharge such duties, he is to be considered as acting in pursuance of the act, and is to be entitled to the protection conferred upon persons whilst so acting”—Per Mr. Justice Bayley.

- (k) 1 Cromp. & M. 662.
- (l) Ante, p. 316, 10 Bing. 429.

being taken that prisoners of the following classes do not intermix with each other." The first class is to consist of " debtors and persons confined for contempt of Court on civil process:" and then comes a proviso, " that, if the keeper shall at any time deem it improper or inexpedient for a prisoner to associate with the other prisoners of the class to which he or she may belong, it shall be lawful for him to confine such prisoner with any other class or description of prisoner, or in any other part of the prison, *until he can receive the directions of a visiting justice thereon*, to whom he shall apply with as little delay as possible, and who in every such instance shall ascertain whether the reasons assigned by the keeper warrant such deviation from the established rules, and shall give such orders in writing as he shall think fit under the circumstances of the particular case." The question here is, whether or not the defendants have acted in obedience to or in pursuance of this provision. The act authorises the sheriff or keeper to place a party in confinement in certain cases *until* he can communicate with a visiting justice. Here, the visiting magistrates declined to interfere, and yet the restraint was continued. It therefore seems to me that the sheriff must stand on his common law right.] Continuing the plaintiff in the cell after a communication had been fruitlessly made to the visiting magistrates, was at all events a mere excess, and does not deprive the defendants of the protection given them by the act.

Mr. Serjeant *Wilde*, contra.—The defendants are clearly not protected by the statute. The sheriff must stand upon his common law right as to the safe custody of prisoners committed to his charge. Besides, this act of parliament was never intended, and cannot be construed to extend to oust the Courts at Westminster of their general authority to direct the place of trial of causes. And here the cause was tried in London in pursuance of

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a rule of Court. The action was originally brought in London; the defendants obtained a rule nisi to change the venue to Surrey, which rule they did not attempt to make absolute (*m*); and the plaintiff afterwards obtained a rule nisi to bring back the venue to London on special circumstances, under the supposition that it had been changed to Surrey: this latter rule was made absolute, no cause being shewn against it.

PER CURIAM.—It turns out that the trial has been had in London by mutual consent: that puts an end to the objection—*consensus tollit errorem*. The defendants had no right to lie by and suffer all the expense of a trial to be incurred; they should have opposed the rule to bring back the venue.

In an action against the sheriff of Surrey and the keeper of the county prison for causing a debtor to be confined in a cell on the felons' side of the gaol, it appeared that the defendants had so done in consequence of an anonymous communication said to have been made to one of the turnkeys, that the plaintiff meditated an escape; and that the matter had been made known to the visiting magistrates, who declined to interfere: but it did not appear that any investigation had been made as to the source whence the information was obtained:—Held, that there was no sufficient proof of reasonable or probable cause on the part of the defendants to justify the course they adopted.

Mr. Serjeant *Spankie* and Mr. *Thesiger* then proceeded to shew cause against the rule for a new trial.—They submitted that the evidence shewed that the defendants were acting with reasonable and probable cause on the information conveyed to the turnkey of the plaintiff's intended escape, and were well justified in removing the plaintiff to a place of safer custody; that the sheriff has a right to place a prisoner in any part of the gaol he thinks fit, provided he acts without undue motives, which is purely a question for the jury; that there was no evidence of malice, or of the infliction of any unnecessary hardship on the plaintiff; and that the onus rested on the plaintiff to prove that what the defendants did was done without reasonable and probable cause, or without undue severity.

(*m*) Intending to rely on this objection.

Lord Chief Justice TINDAL.—This is an action on the case in which the plaintiff complains that the defendants without reasonable or probable cause removed him from the debtors' side of the prison of the county to a cell on that side which is usually devoted to felons, when such a proceeding was not necessary for his safe custody. The question, which comes before us on a motion for a new trial on the ground that the verdict that has been found for the defendants is against the evidence, is, whether there was sufficient proof at the trial that the defendants had reasonable or probable cause for adopting the course they did. The only ground suggested by them was, that some information (by whom given was not disclosed) was conveyed to one of the turnkeys, that the plaintiff meditated an attempt to escape. It appears to me that there was not sufficient evidence of any investigation of this anonymous communication, or of any particular circumstances reasonably calculated to induce the defendants or those acting under them to give credit to it. It is said that the sheriff has a right to place a prisoner in any part of the gaol he may think fit. A more general proposition, however, is this, that he shall not use more force or restraint than is reasonably required for the safe custody of those committed to his charge. Inasmuch as the plaintiff appears to have been consigned to a place of some disgrace, I think it was incumbent on the defendants to shew a sufficient justification of the course taken by them. No doubt they acted on the supposition that what they heard from the turnkey was true. Still I think for the purpose of a more thorough investigation the case should, on payment of costs, be submitted to another jury.

Mr. Justice PARK.—I admit that the Courts ought not lightly to disturb verdicts found upon questions of mere fact. But this case stands under very peculiar circumstances. Whilst we are very cautious in protecting officers

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in charge of prisons, we are also bound to afford protection to those who have the misfortune to fall into their hands from the exercise of undue severity.

Mr. Justice GASELEE.—As the cause must go down again, I do not deem it advisable to add any thing to what has already fallen from the Court.

Mr. Justice BOSANQUET.—I am of opinion that this matter ought to be reconsidered. The defendants appear to me to have failed to make out a sufficient case of reasonable and probable cause for the coercion they used.

Rule absolute on payment of costs.



*Monday,
 June 2nd.*

SWAINE and Others v. STONE.

A rule absolute may be drawn up during term on an order of a Judge dated in vacation.

AN order of a Judge had been obtained in vacation for a reference to the Prothonotary to compute the principal and interest due on a bill of exchange. The Secondary objecting to draw up a rule in term, on the ground that it had never been the practice to do so—

Mr. Serjeant Wilde applied to the Court to give a direction to the officer on the subject.—He submitted that many difficulties would necessarily arise if these orders were not made rules of Court.

THE COURT (after consulting the other Judges) said that they thought it desirable, that, when brought to the office, the order of the Judge should be made a rule of Court.

Rule accordingly.

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EICKE v. NOKES.

Tuesday,
June 3rd.

THIS was an action brought by an attorney to recover the amount of certain bills of costs for business done for the defendant. At the trial before Lord Chief Justice Tindal at the Sittings in London after the last term, the plaintiff was nonsuited on the ground of a failure in proof of the delivery of signed bills a month before the commencement of the suit, under the statute 2 Geo. 2, c. 23, s. 23. The only evidence that was at all perfect was the examination and balance sheet of the defendant under a commission of bankrupt issued against him in 1828 (since superseded), in which examination and balance sheet the amount of the plaintiff's claim was acknowledged; and this it was contended was sufficient evidence to support a count upon an account stated.

In an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant in an examination before the commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated.

Mr. Curwood (who received his instructions at the time of the trial, and had had no communication with the plaintiff since), on the first day of this term, moved for a rule nisi to set aside the nonsuit, and for a new trial, on the ground urged at the trial, and also on the ground that the verdict was against evidence.—He stated that the plaintiff was precluded from commencing another action, by reason of the claim being barred by the statute of limitations.

Lord Chief Justice TINDAL.—It appears to me that the first ground for the motion fails; for, when it was shewn that the demand arose upon an attorney's bill, the party was in the same situation as far as regarded the necessity for a compliance with the statute, as if no admission had been made. This is not like the case of a new security given to the attorney, such as a bill of exchange, or the like. But my learned Brothers think, that, as the amount is large, and the plaintiff is precluded by the statute of li-

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mitiations from bringing another action, the rule may go on the ground of the verdict being against evidence, on payment of costs.

Cause was shewn on a subsequent day by Mr. Serjeant Wilde, and the rule was—

Discharged (a).

(a) See *Eicke v. Nokes*, Moody & Malkin, 303, where Lord Tenterden ruled that the defendant's having signed an admission of the debt, to enable the attorney to prove it under a commission of bankrupt then subsisting against

him, was no admission of the delivery of a signed bill, and did not dispense with the necessity of such proof in an action subsequently brought against him for the same claim.

The plaintiff after being nonsuited took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 59th section of 6 Geo. 4, c. 16.

Mr. Curwood now moved that the plaintiff might be at liberty to stay the proceedings without paying costs, on an affidavit stating that the plaintiff had two days before the commencement of the present term, taken out a fiat in bankruptcy against the defendant founded upon the debt for the recovery of which the action was brought (b).—He referred to the statute 6 Geo. 4, c. 16, s. 59, which enacts and provides (*inter alia*), “that no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission

(b) A solicitor may sue out a commission upon a debt for costs, without having delivered a bill signed—*Ex parte Howell*, 1 Rose, 312—*Ex parte Sutton*, 11 Ves. 163. So, an attorney may prove his bill under a commission of bankrupt without delivering a signed bill—

Per Lord Tenterden in *Eicke v.*

Nokes, Moody & Malkin, 303.—But, where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt at the time of his bankruptcy was not concluded. *Ex parte Prideaux*, 1 Glyn & J. 28.

against such bankrupt, shall prove a debt under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by *any* creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed: provided that *such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him.*" And he submitted that the authorities were clear that a creditor by petitioning for a commission or fiat has made his election to prove under it (c).

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Lord Chief Justice TINDAL.—All that the clause in question directs, is, that a creditor who has before the issuing of the commission brought an action against the bankrupt in respect of a debt provable under the commission, may elect to prove it, and in that case shall relinquish the suit, and shall not be liable to costs in respect thereof. That evidently points at a commission issued at the instance of a third person: and it would be extremely hard upon a party to be compelled to come in as a creditor and prove against the estate, and also pay costs where the action is discontinued without any default on his part. But here the suit has come to its natural end; and the plaintiff seeks to take advantage of his own voluntary act in order to excuse himself from the payment of costs. I therefore think the plaintiff has not brought himself within either the words or the intention of the statute.

The rest of the Court concurring—

Rule refused.

(c) See *Harmer v. Davis*, 1 J. B. Moore, 300, 7 Taunt. 577—*Ex parte Prowse*, 1 Glyn & J. 92.

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The declaration charged the defendants with having assaulted the plaintiff, seized and laid hold of him, pulled and dragged him about, struck him, and forced him from and out of a certain field into and through a pond, and imprisoned him. The plea justified all but the dragging the plaintiff through the pond:— Held, no answer to the action, the matter not covered by the plea, being a distinct and substantive act of trespass.

BUSH v. PARKER and Three Others.

THIS was an action of trespass tried before Mr. Justice Park at the last Spring Assizes at Gloucester. The first count of the declaration stated that the defendants assaulted the plaintiff, seized and laid hold of him, pulled and dragged him about, struck him very many violent blows, and forced him out of a certain field into and through a certain pond, and imprisoned him and tore his clothes. The second count charged a common assault and imprisonment. The third count was for dragging the plaintiff through the pond.

The defendants pleaded the general issue, and also justified the assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about, on the ground that the plaintiff was unlawfully in a certain close of one of the defendants, whence he refused to depart on request. The plaintiff replied, a license from Sir S. Wathen, the owner of the soil, to sport over the locus in quo. The rejoinder denied the license.

The jury found for all the defendants on the issue raised on the special plea, and for the plaintiff against two of them on the general issue, with 5*l.* damages—the dragging through the pond not being justified.

Mr. Serjeant *Ludlow*, in the last term, obtained a rule nisi to enter up judgment for all the defendants upon the whole record non obstante veredicto.—The gist of the action is covered by the plea of justification, which is established by the verdict on the issue raised on that plea. The dragging the plaintiff through the pond was matter of aggravation only, and therefore if the plaintiff intended to rely on it as a distinct and substantive act of trespass, he ought to have new assigned it—*Gates v. Bayley* (*a*), *Dye*

v. Leatherdale (b), Fisherwood v. Cannon (c), Cheasley v. Barnes (d). In *Taylor v. Cole (e)*, it was distinctly held, that, in trespass for breaking and entering the plaintiff's house and expelling him therefrom, the breaking and entering were the gist of the action, and the expulsion mere aggravation; and therefore that a justification as to the breaking and entering would cover the whole declaration. "The first count," said Mr. Justice Buller, "is for breaking, entering, and expelling; the plea only justifies the breaking and entering, shewing a good cause for it; and that is a full answer to the first count; for, the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. If the plaintiff had wished to take advantage of the expulsion, he should have shewn the special matter in a new-assignment."

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Mr. Serjeant Wilde now shewed cause.—All that *Taylor v. Cole* and the other cases cited decide is, that, where the injury is stated with matters of aggravation, the matters of aggravation need not be traversed in pleading; and that a plea justifying the principal matter covers the general charge. In the present case, though the removal of the plaintiff from the field might be justified, the dragging him through the pond is not; and that clearly was a distinct and substantive charge, and is made the subject of a separate count, to which there is no answer whatever. In *Phillips v. Howgate (f)*, the first count of a declaration stated that the defendant assaulted and imprisoned the plaintiff, and, during such imprisonment, struck, pulled, and pushed him about. The defendant justified that he arrested the plaintiff under process, and that the latter, whilst in custody, having conducted himself in a violent manner, the defendant necessarily, and to prevent his

(b) 3 Wils. 20.

(e) 1 Hen. Blac. 555, 3 Term

(c) Cited in 3 Term Rep. 297.

Rep. 292.

(d) 10 East, 73.

(f) 5 Barn. & Ald. 220.

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escape, struck, &c. It was held that this latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new-assign the battery; and that, the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count. That case is precisely in point.

Mr. Serjeant *Ludlow* and Mr. Serjeant *Talfoord*, in support of the rule.—In *Phillips v. Howgate* the plea was of such a nature as to preclude the plaintiff from new-assigning. Here, however, the trespass complained of is one entire transaction, the gist being the assaulting and pulling about, which the plea answers. If the plaintiff had intended to rely on the excess he should have new-assigned. *Taylor v. Cole* is an express authority for this. So, in Williams's *Saunders*, the rule is thus laid down (g): “Where any thing is inserted in the declaration as *matter of aggravation*, the plea need not answer or justify *that*, for the answering of that which is the gist of the action will cover the whole declaration.” In *Monprivatt v. Smith* (h), to an action of trespass for breaking and entering the plaintiff’s house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours; and it was held that the plea covered the whole declaration, and that, if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have so alleged by a new-assignment. In *Lambert v. Hodgson* (i)—where, in an action of trespass for an assault and false imprisonment, the declaration contained two counts, and the defendant pleaded, first, the general issue, secondly, that he and one J. W.

(g) 1 Wms. Saund. 28, n. (3).

(h) 2 Campb. 175,

(i) 8 J. B. Moore, 326, 1 Bing.

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having justified as bail for the plaintiff in an action then pending, he arrested the plaintiff to render him in discharge of the recognizance, and detained him in custody until he had satisfied the demand for which the latter action was brought; the plaintiff replied *de injuria*, and it appeared in evidence that the defendant, in addition to detaining the plaintiff until he had satisfied such demand, caused him to be detained an hour longer, and until he had given a security for the expenses incurred by the defendant in consequence of becoming bail—it was held that this was one continuing trespass and imprisonment, and therefore that the plaintiff ought either to have newly assigned or replied the excess, in order to entitle him to recover for the original detention, which was unjustifiable (*k*). It does not in the present case appear certainly whether the pond was parcel of the close or not; for aught that does appear, it might have been so, and the only way through which the defendants could have expelled the plaintiff.

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Lord Chief Justice TINDAL.—I agree that the rule of law is as stated, *viz.* that, where in trespass the gist of the action is justified by the plea, that which is intended to be relied on as matter of aggravation must be replied specially. But the question is whether the rule applies to this particular case. The plaintiff complains that the defendants assaulted him, seized and laid hold of him, pulled and dragged him about, struck him very many violent blows, and forced him out of a certain field *into and through a certain pond*, and imprisoned him and tore his clothes. In the first place, it does not appear where the pond was, whether in or out of the field. But, waiving that, let us see how much of the declaration the defendants profess to justify. The “assaulting, seizing and laying hold of the

(*k*) And see *Dale v. Wood*, 7 J. B. Moore, 33. See also Comyns's Digest, tit. “Pleader,” (E. 1.).

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plaintiff, and a little pulling and dragging him about;" altogether omitting to notice the allegation as to the forcing the plaintiff to go into and through the pond. The question is whether that is a distinct and separate trespass, or mere matter of aggravation. I am clearly of opinion that it constituted one of a chain of trespasses, and was not an aggravation of the first assault only. Suppose, instead of compelling the plaintiff to walk through a pond, the defendants had thrown him down a precipice and broken his leg or arm, would a plea of this sort justifying assaulting and a little pulling about the plaintiff afford an answer to the breaking the leg or arm? It is clear that it would not: the defendants, in order to justify the act, must shew that their lives were at stake, or, at all events, that the force used by them was not disproportioned to the occasion. Inasmuch therefore as in the present case the dragging the plaintiff through the pond was not necessarily a part of the trespass included in the justification, it is not covered by it; it was a distinct and substantive act of trespass, as to which the plaintiff is unanswered. In *Taylor v. Cole*, upon which the principal reliance has been placed on the part of the defendants, the plaintiff declared in trespass against the defendant for breaking and entering the plaintiff's house and expelling him therefrom: the defendant in one plea justified the entry under a writ of fieri facias, and, in another, the expulsion under a sale of the plaintiff's leasehold interest in the premises by virtue of the fieri facias: and it was held that the expulsion was only matter of aggravation. The Court there lay the whole stress on whether the expulsion might or might not be a substantive trespass. Lord Loughborough says (*l*): "It is not necessary to consider in what cases expulsion may be a substantive trespass. Undoubtedly, to enter a house, and to expel the possessor, may be dis-

tinct acts, and they may be also connected. But, when the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new-assignment, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The plaintiff complains that the defendant broke and entered his house and expelled him: the defendant shews a justification of the entry: if the expulsion makes him a trespasser ab initio, it takes away his justification, and therefore should be replied." But here the dragging the plaintiff through the pond does not appear, from the nature of the allegation, to be an act of trespass coeval with that first charged. It is not an amplification in the description of the same identical trespass. The case of *Phillips v. Hougate* appears to me to go the full length of this. In order to justify the trespass in that case, it was necessary to prove the resistance by the plaintiff when in custody. The defendant having failed to do so, the Court thought the justification insufficient. I think the rule must be discharged.

Mr. Justice PARK.—I am of the same opinion. The question undoubtedly is, whether the dragging the plaintiff through the pond was a distinct act of trespass or a mere aggravation of the original assault. I think it sufficiently appears on the face of the declaration that the pond was not in the field; for it is stated in substance that the plaintiff was forced *out* of the field into the pond. The immersion was clearly a distinct trespass: and, as that is not justified, the verdict must stand.

Mr. Justice GASELEE.—I think it impossible to read this declaration without perceiving that the dragging the

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plaintiff through the pond was a distinct substantive act of trespass, and is not covered by the plea. A plea justifying a mere arrest for debt would be no answer to a declaration charging the defendant with having arrested the plaintiff and dragged him through the streets and handcuffed him. The case of *Stammers v. Yearsley* (m), though it has not been mentioned at the bar, seems to me to be precisely in point. There, the declaration charged an assault and battery of the plaintiff, and taking him in custody along certain streets, and imprisoning him on a false charge of an assault with intent to commit a felony. The defendant pleaded that the plaintiff having assaulted him, he gave him in charge of a peace officer, who took him before a magistrate. All the allegations in the declaration being proved, it was held that the plea was no sufficient answer, although the whole was one entire transaction.

Mr. Justice BOSANQUET.—I am of the same opinion. The defendants contend that the pulling the plaintiff through the pond was a part of the same trespass that they have justified, and was mere aggravation. It appears to me, however, that it was a distinct and separate trespass, and ought to have been separately justified.

Rule discharged.

(m) *Ante*, Vol. 3, p. 410, 10 Bing. 35.

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NIBLETT and Others v. POTTOW.

THIS was an action of assumpsit for money had and received by the defendant to the use of the plaintiffs. The defendant pleaded the general issue, whereupon issue was joined. By consent of the parties, and by order of one of the Judges, the following facts were stated for the opinion of the Court, according to the statute in such case made and provided:—

"By an act of the 39 Geo. 3, c. xlix, intituled 'An act for more effectually repairing, widening, altering, and improving the road at or near Beckhampton, &c., in the county of Wilts,' it was enacted 'that the respective tolls following should be demanded and taken at every turnpike gate of the person or persons attending any cattle or carriage, before any such cattle or carriage should be permitted to pass through the same, that is to say, *for every horse, mare, gelding, mule, or other cattle, drawing any coach or other such carriage, the sum of three pence;* for every horse, mare, gelding, mule, or other beast or cattle drawing any waggon, wain, cart, or other such carriage, the sum of four pence; for every horse, mare, gelding, mule, or ass, laden or unladen, and not drawing, the sum of one penny. And if any person or persons subject to the payment of any of the said tolls should, after demand thereof made, neglect or refuse to pay the same or any part thereof, it should be lawful for the person or persons appointed to collect the tolls to seize and distrain any horse or horses or other cattle, together with their bridles, saddles, gear, harness, or accoutrements, or their loading, or to stop, seize, and distrain *any carriage, with its loading, upon which toll was by that act imposed.*' And it was further enacted 'that no person should be subjected or liable to pay any of the tolls thereby granted more than once in any one day, to be computed from twelve o'clock

Wednesday,
June 4th.

By a turnpike act a toll was imposed "for every horse, &c., drawing any coach, &c.," with a proviso that no person should be subjected to pay toll more than once in any one day "for or in respect of any carriage or any horse, &c." passing through the gates of the trust, such person producing a ticket denoting that the toll had been paid on that day. The plaintiff's passed with a stage-coach drawn by four horses, and paid toll:— Held, that they were not liable to a second toll for passing again on the same day with the same horses, though drawing a different carriage—the toll being imposed on the horses only.

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at night to twelve o'clock at the succeeding night, within each district, *for or in respect of any carriage or any horse*, mare, gelding, or other cattle passing through all or any turnpike or turnpikes continued or erected by virtue of that act within that district, such person producing a ticket denoting that the respective tolls had been paid on that day; which tickets the collectors of the tolls were thereby required to deliver gratis on receipt of such tolls.'

" By an act of 58 Geo. 3, c. lxxxii, intituled ' An act to continue the term and enlarge the powers of an act of his present Majesty, for repairing the road at or near Beckhampton, &c., in the county of Wilts,' reciting that it was expedient that the tolls granted by that act should be increased, it was therefore enacted ' that the said recited act of the 39 Geo. 3, c. xlix, and the several powers, provisions, matters, and things therein contained, except such as were thereby varied, altered, or repealed, should be and continue in full force and effect, and be exercised for and during the term thereafter mentioned, in like manner and as fully and effectually to all intents and purposes as if the same were repealed and re-enacted in the body of that act, but subject nevertheless to the amendments, variations, alterations, and additions in that act contained.' By the 4th section, reciting that the tolls granted by the said act of 39 Geo. 3, c. xlix, had been found insufficient for the purposes therein mentioned, it was enacted ' that, from and after the 13th of December then next, the said tolls should be and the same were thereby repealed, and that instead thereof there should be demanded and taken for every horse or other beast drawing any waggon, cart, or other such carriage, the sum of six pence; *for every horse or other beast drawing any coach or other carriage, of whatever description, the sum of four pence halfpenny;* for every horse or other beast, laden or unladen, and not drawing, the sum of three half pence'—' Provided always, that, in cases where any waggon, cart, or other such car-

riage should be drawn by oxen or other neat cattle, two such oxen or neat cattle should be considered as one horse.' By the 5th section it was enacted 'that the said tolls should not be demanded or taken at more than one toll gate in any one day, from any person or persons, for the same horses or other cattle upon the said respective districts of roads; such day to be computed from twelve o'clock in one night till twelve o'clock in the next succeeding night.' By the 6th section it was enacted, 'that, upon payment of the tolls by that act granted, the collector or receiver thereof should, and he was thereby required to deliver gratis to the person paying such toll a note or ticket denoting such payment.' By the 8th section it was enacted 'that none of the tolls by that act granted should be demanded or taken for or in respect of any *carriage*, horse, cattle, or beast employed in carrying or conveying, or going to carry or convey, or returning from carrying or conveying, or having been employed only in carrying or conveying on the same day, stones, bricks, lime, timber, wood, gravel, or other materials for repairing of the said roads, or any other roads in the several townships, parishes, hamlets, or places in which any part of the said roads are situate.'

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"The defendant was collector duly appointed under the statutes 39 and 58 Geo. 3, at Beckhampton turnpike gate, of the tolls authorised to be taken by the 58 Geo. 3, c. lxxxii. On the 18th December, 1833, the plaintiffs came to and passed upon and along that road, and through that turnpike gate, with a common stage-coach of the plaintiffs' (with passengers) called the Regulator, drawn by four of the plaintiffs' horses, and paid the toll of one shilling and sixpence, being at and after the rate of four pence halfpenny for each and every of the four horses so drawing the said coach; and the defendant delivered to the coachman a note or ticket denoting such payment. On the same day, and before twelve o'clock at night, the

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plaintiff's came and passed upon and along the said road with another common stage-coach of the plaintiffs,' called the Regulator, drawn by the same four horses as the first-mentioned coach, but carrying different passengers; and the plaintiffs then produced the note or ticket so received as aforesaid, and claimed to pass through the same gate with their said last-mentioned coach and passengers and the same four horses, without further payment of toll under the said last-mentioned acts; but the defendant refused to allow the horses so drawing the last-mentioned coach to pass through the toll-gate with the last-mentioned coach, until he had been paid one shilling and sixpence, being the amount of toll claimed for the horses drawing the coach, at and after the rate of four pence halfpenny for each and every horse so drawing the same; and the defendant demanded and received the last-mentioned sum of one shilling and sixpence from the plaintiffs, and against their will."

The question for the opinion of the Court was—"Whether the plaintiffs ought to recover as money had and received by the defendant to the use of the plaintiffs the said sum of one shilling and sixpence so demanded and received by the defendant for and in respect of the said horses so drawing the said last-mentioned coach coming and passing through the said toll-gate."

Mr. *Blackburne*, for the plaintiffs.—Wherever a tax is imposed upon the subject, it must be by words clear and unambiguous—*Leeds and Liverpool Canal Navigation Company v. Hustler* (a), *Bussey v. Storey* (b). And where toll is imposed upon *horses* drawing a carriage, and by a clause of exemption the horses are freed from a second toll upon repassing during the same day, they are not liable

(a) 2 Dow. & Ryl. 556, 1 Barn. & Cres. 424.

(b) 4 Barn. & Adolph. 98.

to the second toll though drawing a different carriage—*Gray v. Shilling* (*c*), *Norris v. Poate* (*d*), *Waterhouse v. Keen* (*e*), *Fearnley v. Morley* (*f*), *Jackson v. Curwen* (*g*), *Chambers v. Williams* (*h*). Here, the 58 Geo. 3, c. lxxxii, s. 4, imposes the toll on the cattle: and by the 16th section of the 39 Geo. 3, c. xlix, it is provided that no person shall be subjected or liable to pay any of the tolls thereby granted more than once in any one day for or in respect of any carriage or any horse &c. passing through all or any turnpike or turnpikes continued or erected by virtue of the act. The exemption is therefore distinct, and the case falls within the authorities cited.

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Mr. Serjeant *Stephen*, for the defendant.—The plaintiffs are bound to shew that they fall within the exempting clause. Now, taking the imposing and the exempting clauses together, it is perfectly clear that the toll in question is substantially imposed upon the carriage; it is “for every horse drawing any waggon, cart, or other carriage;” the toll is upon the conjunct thing: if the horse be not drawing, the toll imposed is less. The first act gives authority to the toll collector, on a party’s refusal to pay the toll, “to stop, seize, and distrain any carriage, with its loading, upon which toll was by that act imposed.” From this clause and the 8th section of the 58 Geo. 3, the Court may infer what was intended by the act to be the subject of the toll. In *Gray v. Shilling*, the exemption was conferred on the person paying the toll. But, in *Hopkins v. Tho-*

(c) 4 J. B. Moore, 371, 2 Brod. & Bing. 30.

payable; the judgment is that it was not.

(d) 10 J. B. Moore, 293, 3 Bing. 41.

(f) 7 Dow. & Ryl. 832, 5 Barn. & Cress. 25.

(e) 4 Barn. & Cress. 200, 6 Dow. & Ryl. 267. The marginal note in 4 Barn. & Cress. erroneously states that the second toll was

(g) 7 Dow. & Ryl. 838, 5 Barn. & Cress. 31.

(h) 7 Dow. & Ryl. 842, 5 Barn. & Cress. 36.

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rogood (i), by a turnpike act a certain toll was to be taken at every turnpike on the road from W. to O., for four horses drawing any carriage, &c. A subsequent section provided that no person should pay toll more than once in the same day for passing or repassing with the same horses *or* carriages through any of the turnpikes, but that every person after having paid toll once, and producing a ticket, should pass with the same horses *and* carriages toll free during such day. It was held that a second toll was payable for passing on the same day two toll-gates on the road, with the same carriage, but drawn by different horses; for that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment.

Mr. *Blackburne* was heard in reply.

Lord Chief Justice TINDAL.—It appears to me to be unnecessary upon the present occasion to have recourse to any of the cases that have been determined upon other acts of parliament: it suffices to look at the act now before us, always bearing in mind that we ought not to hold a toll to be imposed, unless the words of the clause be clear and unambiguous. The question here is, whether or not the exemption from a second toll applies to this case. It is said that the 16th section of the 39 Geo. 3, c. xlix, is the only exempting clause, and that this case must be governed by it. That may be so. But we must first ascertain whether the act imposing the toll, the 58 Geo. 3, c. lxxxii, imposes it on the horses or on the carriage: the 4th section enacts, that, instead of the tolls granted by the 39 Geo. 3, “there should be demanded and taken for every *horse* or other beast drawing any waggon, cart, or other

(i) 2 Barn. & Adolph. 916.

such carriage, the sum of 6*d.*; for every *horse* or other beast drawing any coach or other carriage, of whatever description, the sum of 4*½d.*; for every horse or other beast, laden or unladen, and not drawing, the sum of 1*½d.*" Can any one doubt whether this toll is imposed upon the *horse* or upon the *carriage*? By many turnpike acts a specific toll is imposed in respect of the carriage. But, where this is intended, very different language is used from that which we find here: and, where such different language is adopted, why should we not hold that a different sense is meant? The words of the exemption are—" that no person should be subjected or liable to pay any of the tolls thereby granted more than once in any one day, to be computed from twelve o'clock at night to twelve o'clock at the succeeding night, within each district, for or in respect of any *carriage*, or any *horse*, mare, gelding, or other cattle passing through all or any turnpike or turnpikes continued or erected by virtue of that act within that district, such person producing a ticket denoting that the respective tolls had been paid on that day." Although it may be difficult to give effect to the exemption as regards the carriage, upon which no toll had previously been imposed, it can never be held that an useless exemption from toll destroys the effect of clear and explicit words in a clause imposing toll. We are then referred to a clause in the 39 Geo. 3, which enacts that "if any person or persons subject to the payment of any of the said tolls should, after demand thereof made, neglect or refuse to pay the same or any part thereof, it should be lawful for the person or persons appointed to collect the tolls to seize and distrain any horse or horses or other cattle, together with their bridles, saddles, gears, harness, or accoutrements, or their loading, or to stop, seize, and distrain any *carriage*, with its loading, upon which toll was by that act imposed:" and it is said we may thence infer that the toll was intended to be imposed upon the

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carriage as well as upon the cattle. In the first place, inasmuch as the toll is only imposed upon the horses drawing the carriage, it is not unreasonable to say that the words "upon which such toll is by this act imposed," only apply to the former part of the clause, and that the latter part merely authorises the detention of the carriage and loading by way of additional security. But I hold it to be unnecessary to give a construction to every collateral clause of the act, as I am clearly of opinion that the legislature, in framing the clause imposing the toll, intended to impose it on the horses only; and therefore that the toll in question was improperly demanded.

Mr. Justice PARK.—I am of the same opinion. I cannot distinguish this case from *Gray v. Shilling*, which was decided on almost the very same words as are found here. All the cases are reconcilable with *Gray v. Shilling*.

Mr. Justice GASELEE.—I think there never was a clearer case. The words of the act by which the toll is imposed are as plain as possible. The toll is imposed on the horses, and not on the carriage. The 5th clause in the 58 Geo. 3, says nothing about the carriage. The whole difficulty seems to me to have arisen from the introduction into the case of a clause that has nothing to do with the matter—the 8th section of the 58 Geo. 3, which improperly uses the word carriage. Upon the whole I think there is nothing to justify the supposition that any toll was intended to be imposed other than on the horses.

Mr. Justice BOSANQUET.—I am of the same opinion. Cases of this sort must depend entirely on the particular words of the act of parliament by which the imposition is created. It is perfectly clear in the present instance that the toll is imposed upon the horses and not upon the vehicle. In the exempting clause of the 39 Geo. 3, the

word "carriage" is inserted; but it is omitted out of the clause of exemption in the 58 Geo. 3 (s. 5); and it appears to have been in the former case unnecessarily inserted. If we are to advert to authority, I must confess I do not perceive any distinction between the present case and *Gray v. Shilling* and *Jackson v. Curwen*.

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Judgment for the plaintiffs.

Stamps v. Learner. C.B.R. Ad - Vol. XII. 116.

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THIS was an action of covenant. The venue was laid in Middlesex. The declaration stated, that, by an indenture dated in June, 1812, the plaintiff demised to one E. Hawes a certain messuage with the appurtenances for thirty-one years (wanting fifteen days) from the 25th December, 1809, Hawes covenanting to pay the plaintiff a rent of 37*l.* a year, and all levies, taxes, charges, assessments, and payments whatsoever charged on the premises, and to keep the premises in repair; that Hawes entered; and that afterwards, to wit, in June, 1833, all the lessee's estate, right, title, interest, and term of years then to come and unexpired in the premises legally came to and vested in the defendant, who thereupon entered into the premises, and became possessed thereof, to wit, in the county of Middlesex; that, after the making of the indenture, and during the time thereby granted, and after the defendant became such assignee as aforesaid, and whilst he continued such assignee, to wit, on &c., at &c., a large sum of money, to wit, the sum of 27*l.* 15*s.* of the rent aforesaid, for three quarters of a year of the said term then elapsed, became and was due, and still was in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true in-

*Wednesday,
June 4th.*

An executor who has occupied premises held by his testator under a lease with covenants for payment of rent and taxes and to keep the premises in repair, sued in covenant as assignee, in respect of the privity of estate, is liable on the covenant for payment of rent and taxes to the extent only of the profits: but, for a breach of the covenant to repair, he is liable to the same extent that any other assignee is liable.

Quere, whether there is any distinction in this respect between the case of an executor and that of an administrator.

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tent, and meaning of the said indenture and of the covenant in that behalf so made as aforesaid, to wit, at &c.; that the defendant did not nor would, after the said assignment, and during the said term, and whilst the defendant was so possessed of the said demised premises with the appurtenances as aforesaid, bear, pay, and discharge the levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable after the defendant became such assignee as aforesaid, and whilst he was and continued such assignee, but wholly omitted and neglected so to do, to wit, at &c.; that a large sum of money, to wit, the sum of 10*l.*, for and in respect of such levies, taxes, charges, assessments, and payments as aforesaid, for three quarters of a year of the said term, during which period the defendant was so possessed of the said demised premises with the appurtenances, was in arrear, unpaid, and undischarged by the defendant, contrary to the tenor and effect, true intent and meaning of the indenture and of the said covenant in that behalf so made as aforesaid; and that the defendant did not nor would, after the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the demised premises with the appurtenances as aforesaid, at his own proper costs and charges, as often as need required, well and sufficiently repair the said demised premises.

In his third plea, the defendant said that he ought not to be charged with any damages by reason of the said breaches of covenant, or any or either of them, or any part thereof, otherwise than as administrator of P. Walker as thereafter mentioned, because he said, that, after the making of the indenture in the declaration mentioned, and during the term thereby granted, to wit, on &c., at &c., the said P. Walker duly made and published his last will and testament in writing, and thereby (amongst other things) then and there appointed one James Morrison sole

executor thereof, and afterwards, to wit, on &c., at &c., the said P. Walker died so possessed of the said demised premises, without revoking or altering his said will; after whose death, to wit, on &c., at &c., the said James Morrison, in due form of law, renounced the probate and execution of all and singular the goods, chattels, and credits which were of the said P. Walker at the time of his death, and administration thereof with the will annexed in due form of law was afterwards, to wit, on &c., at &c., granted to the defendant, who afterwards and after the decease of the said P. Walker, to wit, on &c., at &c., as such administrator, entered into and upon the said demised premises and became and was possessed thereof for the residue of the said term of years by the said indenture granted, and then and yet to come and unexpired of and in the said demised premises: And the defendant further said that he had not at any time since the death of the said P. Walker received and derived, or been able to receive and derive, any profit, interest, or advantage as such administrator or otherwise, by or from the said demised premises with the appurtenances, or any part thereof; and that the said demised premises had not, nor had any part thereof, since the death of the said P. Walker, yielded any profit whatsoever; and that the said term was not now, nor at any time since the death of the said P. Walker had the said demised premises or any part thereof been, of any value whatsoever: And the defendant further said that the estate, right, title, interest, and term of years, property, profit, claim, and demand whatsoever of the said P. Walker of and in the said demised premises with the appurtenances or any part thereof, had not at any time come to or vested in the defendant by assignment, otherwise than under and by virtue of such administration as aforesaid, and that the said entry of the defendant was made by him as such administrator as aforesaid: And this &c.—The fourth plea was similar to the

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third, and contained in addition an averment of plene administravit, and an offer to surrender the term before the breaches occurred.

The plaintiff, in his replication to the third plea of the defendant, so far as the same related to the breach of covenant in the declaration first assigned, said that he, by reason of anything by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant in respect of the said breach of covenant first above assigned, because the said demised premises from the time of the death of the said P. Walker hitherto had been and still were of great yearly value, to wit, of the value of the said yearly rent in the declaration mentioned, to wit, at &c.; and this &c.: And the plaintiff, as to the third plea of the defendant so far as the same related to the said breach of covenant in the declaration secondly above assigned, said that the plaintiff by reason of anything in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the defendant in respect of the said breach of covenant secondly above assigned, because the said demised premises from the time of the death of the said P. Walker hitherto had been and still were of great yearly value, to wit, of the yearly value sufficient for the payment and discharge of the said levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable as in the declaration mentioned, to wit, at &c.; and this &c.: And the plaintiff, as to the third plea of the defendant, so far as the same related to the said breach of covenant in the declaration lastly above assigned, said that the plaintiff by reason of anything by the defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the defendant in respect of the said breach of covenant lastly above assigned, because the defendant, since the death of the said P. Walker, could and might have, and

had received and derived great profit, interest, and advantage by and from the said demised premises with the appurtenances, and that the same from the time of the death of the said P. Walker had been and still were of great yearly value, to wit, of the yearly value of 100*l.*, to wit, at &c.; and this &c.—The replication to the fourth plea, which was similar to the above, also took issue on the allegation of plene administravit.

The defendant demurred to these replications; and the plaintiff joined in demurrer.

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Mr. Serjeant Atcherley, in support of the demurrer.—Where rent under a lease accrues due in the time of the testator or intestate, the representative is liable in the detinet only: but, where the rent becomes due after the death, whether the personal representative has entered or not, he may be charged in his representative character; and, where he has entered, the plaintiff may at his election charge him as assignee, in respect of his perception of the profits; in which case it is incumbent on the plaintiff to shew that the defendant has entered and has received profit from the premises—*Bolton v. Canham* (a), *Hargrave's case* (b), *Helier v. Casebert* (c). Where the party is charged as executor or administrator, he is liable to the extent of assets; where as assignee, only to the extent of the profits received in respect of the particular premises—*Rubery v. Stevens* (d). The rule is thus

(a) Freeman, 327. Pollexfen, 125.

(b) 5 Rep. 3. It was there adjudged, that, in an action against the executor for rent due in his own time, the writ should be in the debet and detinet, “for, when an executor takes the profits, nothing shall be assets but the profits above the rent: as, if the land

be worth 10*l.* per annum, and 5*l.* is reserved, in that case nothing shall be assets but the 5*l.* above the rent.”

(c) 1 Lev. 127.

(d) 4 Barn. & Adolph. 241, where all the cases on the subject are summed up. There, the plaintiff having declared in covenant for rent at 26*l.* a year, the defen-

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laid down in Williams's *Saunders* (*e*): "If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or assumpsit for use and occupation, where the lease is not by deed, he may plead plene administravit, and under that plea may shew that the lands yield no profit, and that he has no assets aliunde; but, if the land yields a profit equal to the rent, he will fail on a plea of plene administravit, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a devastavit; if, therefore, the land yields some profit, but less than the rent, it should seem that his plea should be plene administravit praeter the profit. If, on the other hand, the executor be sued, as he may when he enters and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the land yields no profit, or less than the rent, and pray whether he shall be charged otherwise than in detinet; in covenant, he must plead the same matters specially—" citing *Buckley v. Pirk* (*f*), *Remnant v. Bremridge* (*g*), and the cases before referred to. In the present case, the plaintiff has elected to charge the defendant as assignee. The pleas allege in substance that the defendant has received no profits: and this stands admitted by the replications, in

dants pleaded that they were only chargeable as executors, that the term came to them as such, that the premises were of less yearly value than the said rent of 26*l.*, viz. of no value, and that they had fully administered, &c. Replication, that the premises were of the yearly value of 26*l.* Issue thereon. At the trial the yearly value was found by the jury to be 20*l.* It

was held that the replication was, in substance, that the premises were of *some value*; that the issue was merely informal, and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury.

(*e*) 1 Wms. Saund. 112 c).

(*f*) 1 Salk. 316.

(*g*) 8 Taunt. 191, 2 J.B. Moore, 94.

which issue is taken, not upon the perception of profits, which is the test and measure of the defendant's liability, but on the value of the premises, which is an immaterial issue, and bad on demurrer.

The declaration charges the defendant as assignee, in respect of the privity of estate; and therefore the action is local—*Helier v. Casebert*, *The Mayor of Berwick v. Shanks* (*h*). The venue is laid in Middlesex, but it does not on the face of the declaration appear where the premises are situate; and, though this is an objection that would be cured by verdict—*The Mayor of London v. Cole* (*i*)—it is available in this stage of the cause.

Lord Chief Justice TINDAL.—No doubt the action is local. But, in order to let in this objection, we must see upon the face of the declaration that the action is not brought in the county wherein the premises are situate. I think this does not appear; but, on the contrary, I think there is enough on the declaration to shew that the premises are situate in the county of Middlesex; it states that the defendant "entered into the premises, and became possessed thereof, to wit, in the county of Middlesex."

Mr. Serjeant Coleridge, contra.—The declaration shews that all the breaches of covenant complained of occurred during the defendant's possession. The pleas are founded upon the limited nature of the responsibility of an executor, who is liable only to the extent of profits where he is charged as assignee. The authority of *Rubery v. Stevens* may be admitted; but it has this extent only—the executor charged as assignee is liable, in respect of *rent and taxes*, to the extent only of the profits; the rule does not apply to the breach of a covenant to repair, neither does it apply

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Covenant against the personal representative of the lessor of a term, sued as assignee, in respect of the privity of estate, is a local action.

But, where in such an action the venue was laid in Middlesex, and the declaration alleged that the defendant "entered into the premises and became possessed thereof, to wit, in the county aforesaid":—Held (on demurrer), that it sufficiently appeared that the premises were situate in the county in which the venue was laid.

Sensible, that, to let in the objection, it must appear on the face of the record that the venue is laid in the wrong county.

(*h*) 11 J. B. Moore, 372, 3 Bing. 459. (*i*) 7 Term Rep. 583.

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to administrators. There is a manifest distinction between the case of an executor and that of an administrator: the former has a duty cast upon him by virtue of his office; he has no choice in the matter; and to renounce he must do a formal act: whereas the administrator voluntarily enters into possession of the property. As regards rent, the law makes a distinction between an executor sued as assignee and an ordinary assignee; limiting the liability of the former to the amount of profits actually received. And this seems to be given as an equivalent for the advantage possessed by the landlord in being preferred in respect of rent to a common creditor: the executor receiving the rent in the character of an agent for the landlord. But the executor's liability to repair stands on a very different footing. In *Spencer's* case it is said (*k*): "If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant and goeth with the land in whose hands soever the term shall come, as well those who come to it by act in law as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take the benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenant when the lessee makes it with the lessor." Suppose here the lessor had covenanted to repair, can it be doubted that he would have been liable to the administrator of the lessee? In *The Dean and Chapter of Windsor's* case (*l*), a man demised a house by indenture for years; the lessee for him and his executors covenanted and granted with the lessor to repair the house at all times necessary; the lessee assigned it over to Hyde, who suffered it to decay. The

(*k*) 5 Rep. 17. b.

—cited in Rolle's Abridgment,

(*l*) 5 Rep. 24. b., Cro. Eliz. 552 "Covenant," (L).

lessor brought an action of covenant against the assignee: and it was adjudged by Lord Chief Justice Popham and the whole Court that the action of covenant did lie, although the lessee had not covenanted for him and his assigns; "for such covenant which extends to the support of the thing demised is quodammodo appurtenant to it and goes with it. And in respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the less, which goes to the benefit of the assignee, and—*qui sentit comodum sentire debet et onus.*" An executor in possession is liable for waste (*m*). The case of a covenant to repair, therefore, clearly stands upon a different foundation from that of a covenant for payment of rent. Consequently, the pleas in this case are bad, inasmuch as they affect to answer the breach of the lessee's covenant to repair. The only distinction between the third and fourth pleas is, that, in the latter, there is an allegation of plene administravit, and also of an offer by the defendant to surrender the term—put in upon the supposed authority of *Remnant v. Bremridge*. Where an executor or administrator is sued as assignee, he cannot plead plene administravit: and if the administrator be legally liable in respect of the repairs, his offer to surrender can hardly be held to absolve him from that liability. The pleas allege that the defendant has received no profit from the premises, and that they are of no value. Issue is taken in the replications upon the fact of whether the premises are of any value or not. That of course was the proper issue: the true question is, not whether the defendant has or has not received profit from the premises, but whether or not they were capable of yielding profit.

Mr. Serjeant Atcherley, in reply.—No authority can be

(*m*) 2 Inst. 302, *Tilney v. Norris*, 1 Lord Raym. 553, 1 Salk. 309, Carth. 519.

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found recognising the distinction that has been suggested, between the case of an executor and that of an administrator. Nor can any such distinction, if it exists, be applicable to a case like the present, where the defendant is sued, not in his representative character, but as assignee of the term: the judgment against him being *de bonis propriis*. When sued in their representative capacity, both executors and administrators are liable to the covenants of the testator or intestate, to the extent of assets. It may be conceded that an assignee is ordinarily liable upon a covenant of this description: but the question is, whether the defendant is to be charged ultra the profits by him received.

Lord Chief Justice TINDAL.—It appears to me to be unnecessary to give any opinion as to the sufficiency of the replication, because I am satisfied that the third and fourth pleas are bad in law. A plea that is bad in part is bad altogether. The third and fourth pleas affect to give an answer to the breach of the covenant to repair, as well as the non-payment of rent. The law affecting executors and administrators in the one case is different from that in the other: both do not fall within the same reason. The profits that are received by an executor are received by him in the nature of an agent for the landlord, to be handed over to him in satisfaction of the rent. *Hargrave's* case puts it precisely upon that footing. The executor cannot consider it as assets held by him as executor. No such reason, however, applies with respect to the covenant for keeping the premises in repair. It would be strange, indeed, to hold an executor to be exempted from liability in respect of a covenant to repair because the profits derived from the premises are not adequate to meet the costs of repairing. It would in effect be saying that the landlord shall not receive back the premises at the end of the term. Suppose the premises to be out of repair at the

end of the first year, and the executor had no assets; at the expiration of another year they would naturally be in a worse condition; and so on from year to year—the profits in the mean time becoming less every year; so that it might ultimately be impossible to restore them to a fit state of repair: and then, if the executor were without assets, at the end of the term the landlord would find the premises utterly destroyed, and be without remedy. It is manifest, therefore, that the covenant to repair stands upon a very different footing from a covenant to pay rent. None of the authorities that have been cited go the length of shewing that an executor or administrator who is sued as assignee is not chargeable in respect of non-repairs in the same manner as any other assignee. All the cases cited on the part of the defendant are actions for rent—where the plaintiffs sued in the debet or debet and detinet, which can only apply to non-payment of rent. On the other hand, the authorities cited on the part of the plaintiff tend to shew that the principle does not extend to damages accruing from the want of keeping the demised premises in proper repair according to the covenants. The case of waste bears a strong resemblance to an action for non-repair. The law is clear that an action of waste would lie against an executor or administrator for any waste done in his time, as well for permissive as for voluntary waste (*n*). In Coke Littleton it is said (*o*): “If lessee for years doth waste and dieth, an action for waste lieth not against the executor or administrator for waste done before their time”—leaving it to be inferred that the action would lie if the waste occurred in *their time*. In the case of *Tilney v. Norris* it is said (*p*): “The executor or administrator of a tenant for years shall be punished for waste done in their own time; and the judgment for the damages shall be against them de bonis propriis. And

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(*n*) See 2 Inst. 302. (*o*) Co. Litt. 54. (*p*) Lord Raymond, 554.

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there is no difference between permissive and voluntary waste that will influence this case, because this breach of covenant is in nature of permissive waste; except that the case of waste is stronger, because treble damages are recoverable there, but single damages only in covenant. And if the executor assigns over, waste will lie against him in the tenuit; therefore it is not hard to support this action; and judgment shall be against him *de bonis propriis.*" Thus, an executor is liable for the continuance of waste that originally commenced in the time of his testator. I therefore see no reason why he should not also be liable in covenant for non-repair. In *The Dean and Chapter of Windsor's* case (*q*), a man demised a house by indenture for years; the lessee, for him and his executors, covenanted and granted with the lessor to repair the house at all times necessary; the lessee assigned it over to Hyde, who suffered it to decay; the lessor brought an action of covenant against the assignee. And it was adjudged by Lord Chief Justice Popham and the whole Court—"That the action of covenant did lie, although the lessee had not covenanted for him and his assigns; for, such covenant which extends to the support of the thing demised is quodammodo appurtenant to it, and goes with it. And in respect the lessee hath taken upon him to bear the charges of the reparations the yearly rent was the less, which goes to the benefit of the assignee, and *qui sentit commodum sentire debet et onus.* If a man grants to one estovers to repair his house, it is appurtenant to his house (*r*). If the lessee covenants to discharge the lessor *de omnibus oneribus ordinariis et extraordinariis*, and to repair the houses, an action lies against the assignee." On the ground, therefore, that this defence is now for the first time brought forward as applicable to the case of covenant against an executor for non-repair, and that no authority can be cited

for it, and looking at the reason of the thing, I think the pleas are bad for attempting to extend the exemption of the executor's liability further than the law allows: and, being bad in part, they are bad in the whole. I do not conceive it to be necessary to say anything as to the distinction that has been suggested between the case of an executor and that of an administrator. I think the plaintiff is entitled to judgment.

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Mr. Justice PARK and Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—I am of the same opinion. The general rule is that an executor who enters may be charged as assignee: but there is this exception, viz. that, in respect of rent, he shall only be chargeable to the extent of what the premises are capable of yielding. There is no authority for applying the exception to a covenant to repair. It is unnecessary on this occasion to say whether or not the distinction applies also to the case of an administrator.

Judgment for the plaintiff.

ALCHIN v. HOPKINS, Clerk.

THE defendant, a clergyman having a benefice with cure of souls of the value of 148*l.* a year, and possessed of no other property whatever, being indebted to several persons, procured them to enter into the following agreement:—

the purpose of the surplus (after payment of a competent stipend to a curate to serve the church) being applied in liquidation of his debts:—Held, a charge upon the living, and void by the 13 Eliz. c. 20:—Held, also, that an agreement of the above description, signed by the creditors only, and not by the debtor, or by any person thereunto by him lawfully authorized, does not amount to such a substitution of a new agreement in the place of the old contract as to operate as a bar to an action at the suit of a creditor who has signed it—it being a contract "for an interest in or concerning lands, tenements, or hereditaments," within the statute of frauds.

*Thursday,
June 5th.*

Where a beneficed clergyman enters into an agreement to permit the profits of his living to be received by a third person for

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"Whereas the Rev. Henry John Hopkins, late of the city of Winchester, clerk, is indebted unto the several persons whose names are hereunto subscribed in certain sums of money which he is unable to pay: Now, therefore, know all men that the said several creditors do, and every of them doth hereby, for himself, his heirs, executors, and assigns, undertake and agree not to sue, arrest, or molest, or permit or suffer to be sued, arrested, or molested the said Henry John Hopkins for or on account of any monies due and owing from him to the said several creditors or either of them at the day of the date hereof, in consideration that the future income of the said Henry John Hopkins may be received by the Rev. Harry Lee, the younger, of the said city of Winchester, clerk, or some other person duly appointed by the said Henry John Hopkins, and applied in the liquidation of the said debts in such manner as to the said Harry Lee or such other person shall appear most expedient: it being clearly understood that the annuity to Alexander Morrison and Abigail Sarah, his wife, and the yearly premium of the policy for insuring 500*l.* on the life of the said Henry John Hopkins in the Atlas Assurance Company, if such policy shall be kept on foot, as well as a competent stipend for a curate to serve the church of the said Henry John Hopkins, shall be first paid by the said Harry Lee."

The above agreement was dated the 14th August, 1833, and was signed by the defendant and nineteen other creditors, but it was not signed by the defendant, though it was proved that he had acted on it.

At the trial, before Mr. Justice Gaselee, at the last Spring Assizes at Winchester, the Rev. Harry Lee, who was called as a witness on the part of the defendant, proved that he had in pursuance of the above agreement received the income arising from the defendant's benefice, and, after paying the annuity therein mentioned, and 90*l.* a year as a stipend for a curate, had applied the surplus

towards the liquidation of the debts of those persons by whom the agreement was signed.

On the part of the plaintiff it was contended that the agreement afforded no answer to the action, on the grounds—first, that it had not been executed by the defendant—secondly, that it was void for want of consideration—thirdly, that it was an agreement in express contravention of the statute 13 Eliz. c. 20, s. 1, which enacts “that all chargings of benefices with cure with any pension or with any profit out of the same to be yielded or taken, thereafter to be made, other than rents to be reserved upon leases thereafter to be made according to the meaning of that act, should be utterly void.”

The question left to the jury was whether the sum of 90*l.* per annum was a reasonable remuneration for the curate. They found that it was; whereupon the plaintiff was nonsuited—the points arising on the agreement being reserved for the consideration of the Court.

Mr. Serjeant Coleridge accordingly, in the last term, obtained a rule nisi to set aside the nonsuit and enter a verdict for the plaintiff for the amount of the debt—253*l.*, on the grounds urged at the trial.

Mr. Serjeant Merewether shewed cause.—The defendant was bound by the agreement notwithstanding he had not signed it, he having acted upon it: and the consideration to each creditor was the forbearance of the rest—*Good v. Cheesman* (*a*). The statute of Elizabeth only applies to cases where the benefice is so charged by deed or by warrant of attorney as to shew that the parties contemplated a sequestration, as in *Doe d. Hutchinson v. Carter* (*b*), *Flight v. Salter* (*c*), *Newland v. Watkin* (*d*), and *Faircloth*

(*a*) 2 Barn. & Adolph. 328.

(*b*) 8 Term Rep. 57, 300.

(*c*) 1 Barn. & Adolph. 673.

(*d*) Ante, Vol. 2, p. 174, 9 Bing.

113. The defendant, a beneficed clergyman, gave the plaintiff a

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v. *Gurney* (*e*). In *Gibbons v. Hooper* (*f*), a beneficed clergyman granted annuities by three several deeds, and (by the same deeds) made them chargeable on his living, which he thereby conveyed in trust for the grantee, for the more effectually raising and enforcing payment of the annuities out of the living: and he also gave as a security for the payment of the annuities, three several warrants of attorney, with defeasances in the common form, to confess judgment at the suit of the grantee. On a motion to set aside the warrant of attorney, as being a charge upon the living, in evasion of the statute 13 Eliz. c. 20—Lord Tenterden said: “I think the present case is different from those which have been referred to on the subject of charging benefices. The deeds which the plaintiff sought to enforce by means of these warrants of attorney were good as grants of annuities, though void so far as they went to charge an ecclesiastical benefice. There is no

warrant of attorney to secure a previously contracted debt, authorizing the plaintiff to enter up judgment thereon, “and immediately thereupon to sue out one or more writ or writs of fieri or levandi facias de bonis ecclesiasticis, or sequestrari facias, and to procure one or more sequestrations thereon” against the defendant’s livings. The plaintiff having accordingly entered up judgment and sequestered the livings, the Court (at the instance of an annuity creditor, having a subsequent judgment, and without the concurrence of the defendant) granted a rule to restrain the plaintiff from further enforcing his writ of sequestration—on the ground that the warrant of attorney, being a “charging of the

benefice with a pension or profit,” was void by the statute 13 Eliz. c. 20.

(*e*) *Ante*, Vol. 2, p. 822, 9 Bing. 622. A deed of annuity granted by a beneficed clergyman, authorized the grantee to sequester a rectory of which the grantor was the incumbent, for any arrears of the annuity; a warrant of attorney authorizing the grantee to enter up judgment against the grantor for 1440*l.*, given as a further security, recited the deed, but did not itself directly charge the living:—Held, that, although the deed was void as far as it operated as a charge upon the rectory, yet that the warrant of attorney was valid.

(*f*) 2 Barn. & Adolph. 734.

thing in the defeasances of the warrants of attorney to shew that they were intended to bind the living more than in any other case where a clergyman gives the same security. If we hold these void, we must set aside every warrant of attorney given by a clergyman holding a benefice, because its effect may ultimately be a sequestration of the living." So here, the instrument does not on the face of it purport to operate a charge upon the defendant's benefice, and therefore it is not within the statute: the church is still to be provided with a competent curate.

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Mr. Serjeant Coleridge, in support of the rule.—Undoubtedly the cases cited shew, that, where the instrument does not actually operate a charge upon the living, it is not within the prohibition of the statute. But, if the deed does operate a charge, then it clearly is void. The Courts will not prevent the sequestration of a benefice under a judgment obtained in the ordinary course upon a warrant of attorney: but they will interfere to prevent the profits of a living from being taken under an execution founded upon a warrant of attorney given to secure an annuity—*Kirlew v. Butts* (g). Inasmuch therefore as this agreement is not valid in law, and is clearly within the spirit of the act and the mischief it was intended to remedy, it cannot be set up as an answer to the action. In *Good v. Cheesman* the original debt was extinguished by a new contract.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question brought before the Court in this case is, whether the agreement for a composition entered into between the defendant and such of his creditors as signed

(g) 2 Barn. & Adolph. 736, n.

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the same, operates as an answer to the present action. By the terms of the agreement, the several creditors who signed the same agreed not to sue, arrest, or molest the defendant "in consideration that the future income of the said defendant might be received by the Rev. Harry Lee, clerk, or some other person duly appointed by the said defendant, and applied in the liquidation of the said debts." It was found at the trial of the cause that the defendant had no other income than the profits of a benefice with cure of souls. The agreement may, therefore, be considered to refer to the income of the defendant arising from his living, and no other. The objection made on the part of the plaintiff, is, that the agreement is void by the statute 13 Eliz. c. 20, by which "all chargings of any benefices with cure with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, shall be utterly void." The effect of the instrument, supposing it to have any effect whatever, is, to appropriate the future profits of the living to the payment of the debts of the defendant; for, we cannot think the clause by which it is provided that a competent stipend for a curate to serve the church shall be first paid, will take the agreement out of the statute. There are many purposes to which the profits of a benefice ought to be employed, on principles of public policy, besides the finding of a curate, such as, the repairs of the chancel and parsonage, the money payments to which the church is liable, and the like. The effect of the instrument, therefore, although not operating as a direct charge, is an agreement to charge the profits of the living; and, if such an agreement were not held to fall within the prohibition of the statute, all its purposes might be avoided with the greatest facility. But, independently of the objection under the statute of Elizabeth, it appears that this agreement was never signed by the defendant. In case, therefore, the creditors should sue upon it, they would be met by

the preliminary objection, that a contract for the profits of a living to be paid over to a trustee or receiver, was a contract "for an interest in or concerning lands, tenements, or hereditaments," and that no action would lie upon it, as it had not been "signed by the defendant, or by any person thereunto by him lawfully authorized." We think, upon this ground also, the agreement for composition is not of such a description as can be held a bar to the present action. For, the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement, by mutual consent, and on good consideration, in the stead and place of the old contract. This is the point established by the case of *Good v. Cheesman*, to which we entirely accede. The new or substituted agreement must, therefore, of necessity be one which is legal and valid, or the whole ground on which the release of the former contract depends is destroyed. Inasmuch, however, as the agreement in question is liable to the objections above adverted to, we think it fails as a composition that can be enforced at law.

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Rule absolute for entering the verdict
for the plaintiff for 253*l.*

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*Friday,
June 6th.*

One W. S. J., on behalf of himself and the other owners of the ship Warrior, chartered her to one H. C. S. for a voyage to Sydney and New South Wales, for a period of six months certain, or longer if required, at a certain monthly freight. Disputes having arisen between the parties as to the time from which the freight should begin to be payable, and as to whether or not security should be given for the six months' freight, and the plaintiffs having refused to permit H. C. S. to sail in the Warrior until the security was given; the defendant undertook to get a copy of the following guarantee (addressed to one

of the defendants) signed by one T. P. M.:—"In consideration of your having on behalf of yourself and other owners of the Warrior entered into a charterparty with H. C. S., &c., &c.; and whereas the said H. C. S. hath paid or secured to be paid the said freight for the period of six months commencing from the 20th August last; and the said H. C. S. being about to leave England in the said ship; I do hereby guarantee unto you, on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use and hire of the said ship which shall or may become due and payable from the said H. C. S. for any period beyond the said six months pursuant to such charterparty; and, in default of payment thereof as aforesaid by the said H. C. S. or his agent, I hereby undertake and agree to pay the same on demand:—Held—first, that this was not a contract to answer for the debt, default, or miscarriage of another, within the statute of frauds—secondly, that the undertaking itself would not have been binding upon T. P. M. himself, there being no consideration for the promise appearing upon the face of it, either directly expressed or to be supplied by fair and necessary inference; and consequently that nominal damages only could be recovered against the defendant for the breach of his undertaking to procure the signature of T. P. M. thereto.

BUSHELL and OTHERS v. BEAVAN.

THIS was an action of assumpsit.—The first count of the declaration stated, that, on the 12th June, 1829, to wit, at London, by a certain charterparty then and there made and concluded between W. S. Jacques, for and on behalf of himself and the plaintiffs, other the owners of the ship called the Warrior, then lying in the port of London, of the one part, and H. C. Sempill, freighter of the said ship, of the other part, the said charterparty being sealed with the seal of the said H. C. Sempill—it was witnessed that the said W. S. Jacques, acting as aforesaid, for the consideration thereafter mentioned, did thereby promise and agree to and with the said freighter, his executors, administrators, and assigns, that the said ship should set sail and proceed to Swan River and Sydney, New South Wales, and then proceed to such port or ports, place or places, and for such purposes, as the said freighter, his executors, administrators, or agents, might order or direct; that the ship should immediately go into the St. Katherine's Dock, and the poop and cabins be erected, altered, and finished in the manner prescribed by the charterparty, on or before the 24th June: in consideration whereof, and of every thing above mentioned, the said H. C. Sempill, for himself, his executors, administrators, and assigns, did

thereby covenant, promise, and agree to and with the said W. S. Jacques, his executors, administrators, and assigns, to take the said ship into his service for the voyage thereinbefore specified, and for and during the term or space of six calendar months certain; and also to pay or cause to be paid unto W. S. Jacques, his executors, administrators, and assigns, freight for the use or hire of the said ship, at and after the rate of seventeen shillings per register ton per calendar month, for and during the term or space of six months at the least, to reckon and be accounted from the 12th July then next ensuing, and at and after the like rate for all further time (if any) that might be necessary for the completion of her aforesaid intended voyage and service, and until she should be finally discharged as aforesaid, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, one third of the six months' pay to be paid on the clearing of the vessel outwards at the Custom-House in the port of London; 400*l.*, in further part of the said monthly pay, to be receivable by the commander out of the freight payable at New South Wales or some other intermediate port; and the remainder of the said monthly pay to be paid by good and approved bills of exchange at six months' date from the day the said vessel should clear outwards at the Custom-House of London. And the plaintiffs averred, that, after the making of the said charterparty, and before the making of the promise and undertaking of the defendant next mentioned, divers disputes and differences had arisen and were depending between the plaintiffs and the said H. C. Sempill, as to whether or not the period of hire of the said ship should commence from the said 12th of July, 1829, and whether or not the payment of the freight so as aforesaid to be paid by the said H. C. Sempill for the use or hire of the said ship, should commence and be payable

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from the said 12th of July, 1829, and also, as to whether or not the said H. C. Sempill should give the plaintiffs security for the payment of freight for the use and hire of the said ship, which should or might become due and payable from the said H. C. Sempill, for any period beyond six months, to be reckoned and accounted from the said 12th of July, 1829, according to the terms and conditions of the said charterparty, to wit, at &c.; and that, before and at the time of the making of the promise and undertaking of the defendant as next mentioned, the plaintiff had refused to suffer and permit the said H. C. Sempill to leave England in the said ship or vessel under the charterparty, until he had given such security as aforesaid: and thereupon, on the 6th October, 1829, to wit, at &c.. in consideration of the premises, and that the plaintiffs would put an end to the disputes and differences, and consent and agree that the period of hire of the said ship should commence from the 20th August, 1829, and that the payment of the freight should commence and be payable from the said 20th August, 1829, and that the said H. C. Sempill should not be liable for any charge for the said freight for any period antecedent to the 20th August, 1829; and also in consideration that the plaintiffs, at the special instance and request of the defendant, would suffer and permit the said H. C. Sempill to leave England in the said ship or vessel without giving the said security, the defendant undertook, and then and there faithfully promised the plaintiffs to procure one Thomas Potter Macqueen duly to sign and enter into a written guarantie, and that he would deliver the same to one Henry Brittan within a week then next following; by which guarantie the said T. P. Macqueen should guarantee the plaintiffs the due and faithful payment of all freight for the use or hire of the said ship which should or might become due and payable from the said H. C. Sempill for any period beyond the said six months, pursuant to such charterparty.

such period of six months to commence from the said 20th August, 1829, according to the terms and conditions of the said charterparty; and that, in default of payment thereof as aforesaid by the said H. C. Sempill or his agents, the said T. P. Macqueen would pay the same on demand: and the plaintiffs averred, that they, confiding in the said promise and undertaking of the defendant, did afterwards, to wit, on the said 6th October, 1829, t ^o wit, at &c., put an end to the said disputes and differences, and consented and agreed that the period of hire of the said ship should commence from the 20th August, 1829, and that the payment of freight should commence and be payable from the said 20th August, 1829, and that the said H. C. Sempill should not be liable to any charge for the freight for any period antecedent to the 20th August, 1829; and did then and there suffer and permit the said H. C. Sempill to leave England in the said ship or vessel without giving the said security: and although a week from the time of the making the defendant's said promise and undertaking had long since elapsed, yet the defendant, not regarding his said promise and undertaking, but coniving to injure the plaintiffs in that behalf, did not nor would, within the time aforesaid, or at any time before or afterwards, procure the said T. P. Macqueen to sign or enter into any written guarantie, whereby he guaranteed the due and faithful payment of all freight for the use or hire of the said ship, which should or might become due and payable from the said H. C. Sempill for any period beyond the said six months, pursuant to such charterparty, such period to commence on the said 20th of August, 1829, according to the terms and conditions of the said charterparty, and that in default of payment thereof as aforesaid by the said H. C. Sempill or his agent, the said T. P. Macqueen would pay the same on demand; nor did the defendant, within the space of the said week, or at any time afterwards, procure such or any guarantie of the said T. P.

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Macqueen to be delivered to the said Henry Brittan, but so to do had hitherto wholly neglected and refused, and still did neglect and refuse: and the plaintiffs averred, that the said H. C. Sempill had had the use and hire of the said ship on freight as aforesaid for a long space of time after the expiration of the said six months commencing from the said 20th August, 1829, to wit, from thence hitherto; and that the freight of the said ship or vessel during that period amounted to a large sum of money, to wit, to the amount of 2,000*l.*, which was still due and owing to the plaintiffs; and by means of the premises the plaintiffs had been and were likely wholly to lose the same and any future freight that might become due and payable from the said H. C. Sempill for and on behalf of the said ship; and also by means of the premises the plaintiffs had been and were otherwise much injured and damaged, to wit, at &c.

The fourth count alleged, that, on the 12th June, 1829, to wit, at &c., by a certain other charterparty then and there made and concluded between the plaintiffs, the owners of the ship in the first count mentioned, of the one part, and the said H. C. Sempill of the other part, sealed with the seal of the said H. C. Sempill, it was witnessed of and concerning the said ship, and the freight and hire of the same, as in and by the charterparty in the first count mentioned, to wit, at &c.; that, on the 6th October, 1829, to wit, at &c., in consideration that the plaintiffs, at the special instance and request of the defendant, had consented and agreed that the period of hire of the said ship should commence from the 20th August, 1829, instead of the 12th July, 1829, and that the said H. C. Sempill should not be liable for any charge for the said freight for any period antecedent to the said 20th August, 1829; and also, in consideration that the plaintiffs, at the special instance and request of the defendant, had suffered and permitted the said H. C. Sempill to leave England in the

said ship on the defendant's guaranteeing the payment of the said freight to commence after the period of six months, which said six months were to be accounted from the said 20th August, 1829, the defendant undertook and then and there faithfully promised to guarantee the plaintiffs the due and faithful payment of all freight for the use or hire of the said ship or vessel which should or might become due and payable from the said H. C. Sempill for any period beyond the said six months, such period of six months to commence from the said 20th August, 1829, according to the terms and conditions of the said charterparty; and that, in default of payment thereof by the said H.C.Sempill or his agents, the defendant would pay the same on demand, it being understood that the defendant was not to be bound by the commander's certificate alone of the amount of freight due, without further proof of such amount being due: and the plaintiff averred, that afterwards, to wit, on the 17th May, 1831, to wit, at &c., a large sum of money, to wit, the sum of 2,000*l.*, became and was still due and owing from the said H.C. Sempill to the plaintiffs for freight, for the use and hire of the said ship, the same having become due and payable from him for a period beyond the said six months, such period of six months commencing from the said 20th August, 1829, according to the terms and conditions of the said charter-party, to wit, from thence hitherto, and the said H. C. Sempill and his agents had hitherto made default in payment of the same; of which said premises the defendant afterwards, to wit, on the said 17th May, 1831, to wit, at &c., had notice, and thereupon payment of the freight so due was then and there demanded of him by the plaintiffs: yet the defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure the plaintiffs in that behalf, had not as yet paid them the said freight or sum of 2,000*l.* so due and owing

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as aforesaid, but so to do had hitherto wholly neglected and refused, to wit, at &c.

The defendant pleaded the general issue.

At the trial before Lord Chief Justice Tindal, at the Sittings in London after last Hilary Term, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

The plaintiffs, at the time of entering into the charter-party set out the pleadings, and up to the time of this action, were the owners of the ship *Warrior*. On the 12th June, 1829, the charterparty set out in the pleadings was made and concluded in London between the plaintiff W. S. Jacques, acting for and on behalf of himself and the other plaintiffs, and H. C. Sempill, under the respective seals of W. S. Jaques and H. C. Sempill. In pursuance of that charterparty the ship went into St. Katherine's Dock on the 24th June, 1829, and was on the day after in a fit state to take on board her cargo; and the freighter then took possession of her; but the poop and cabins were not completely fitted up and furnished in pursuance of the charterparty until some time afterwards, although many passengers were engaged and took possession of the ship some time before the painting was completely finished. Previous to the ship's being ready for sea, and about the latter end of September, 1829, disputes and differences arose between the plaintiffs and H. C. Sempill, arising out of the poop and cabins not being completely fitted up and finished by the 24th June; and otherwise as to whether or not the period of hire of the ship should commence from the 12th July, as stipulated in the charterparty; and as to whether or not the payment of freight should commence and be payable from day; and also, as to whether or not Sempill should give the plaintiffs a security for the payment of the freight which should become due for any period beyond the six months, to be reckoned from that day; and also as to

whether or not Sempill should continue the ship in his service after her arrival and discharge at Swan River. The plaintiffs refused to allow the vessel to go to sea until the settlement of such disputes and differences. On the 2nd October, 1829, the defendant, then acting as the attorney for Sempill, and also as the attorney for T. P. Macqueen, wrote to the plaintiff Jacques the following letter:—

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"Sir,—My friend and client, Mr. Sempill, has been with me, accompanied by Mr. Cross and the captain of the Warrior, to arrange finally the settlement of the affairs of that ship previous to her departure from the port of London. The only difficulty that presented itself to a fair and proper conclusion, was, the period from which Mr. Sempill's payment of the six months' rent should commence: Mr. Cross proposing that the day should be from the first week in August: Mr. Sempill declining to accede to such a proposal, and suggesting that the period of payment should not commence till the 1st September. Upon reference to your captain, it was admitted (and in which admission Mr. Cross acquiesced) that the reparations &c. of the cabins and other parts of the ship were not completed until the 12th August, although the owners covenanted that all should be completely finished by the 24th June; in which case the rent was to commence from the 12th July; thus giving Mr. Sempill a clear period of eighteen days from the completion of the repairs to the day of commencement of payment. Mr. Sempill really is not bound to make the payment required of him; and on his behalf I decline to advise him to do so. Mr. Cross has asked me for some security for the surplus of six months' rent, if his hire exceeds that term; this Mr. Sempill is not bound to give, neither have the owners any right to require: but, if the other part of our difference on Mr. Sempill's reasonable request be acquiesced in, I have no

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objection on his part to give them good and sufficient security; otherwise I must decline it. I beg the favour of hearing from you by return of post, with the determination of the owners of Bristol. "J. P. Beavan."

In consequence of that letter, and for the purpose of settling the disputes and differences between the parties, on the 6th October, 1829, a meeting took place between Mr. Cross, one of the plaintiffs, the said H. C. Sempill, the defendant, as attorney on his behalf, and Mr. Brittan, as attorney for the plaintiffs. On that occasion Sempill drew up and signed the following letter:—

" Gentlemen,—I beg leave to inform you that I will not require the Warrior for any period after she has performed her voyage to Sydney, and discharged her cargo.

" H. C. Sempill."

The following memorandum was also indorsed on the charterparty held by Sempill, and signed by Mr. Cross, for himself and the other plaintiffs:—

" For and on behalf of W. S. Jacques, myself, and the other owners of the ship Warrior, chartered by H. C. Sempill, I hereby, in consequence of the reparations to such ship not having been completed by the period in the charterparty mentioned, covenant, promise, and undertake that the period of hire of the before-mentioned ship shall commence from the 20th August last past; and that the payment of the freight of such vessel shall commence and be payable, from the 20th August last past; and that Mr. Sempill shall not be liable for any charge for freight or rent for any period antecedent to such 20th of August, 1829.

" For self and other owners,

" W. Cross."

On that occasion also a guarantie written in the shape of a letter, in the following form, and addressed to W. S.

Jacques, was drawn up for the signature of T. P. Macqueen, and agreed on by the defendant:—

"Sir,—In consideration of your having, on behalf of yourself and other owners of the ship called the Warrior, entered into a charterparty of affreightment with Mr. H. C. Sempill for a voyage of the said ship or vessel to the Swan River and Sydney, New South Wales, whereby it is agreed that the said ship shall remain and continue in the service of the said freighter for and during the term or space of six calendar months at the least, to reckon and be accounted from the 12th day of July last past, and for and during such longer time or term, if any, as may be necessary to complete the said intended voyage up to the day of her final discharge; and whereby, after covenanting for the payment of the freight for and during the said six months, at the times and in the manner therein mentioned, the said H. C. Sempill did covenant that the freight for any period beyond the said six months shall be paid in London by the freighter or his agents, as in the said charterparty mentioned: and whereas the said H. C. Sempill hath paid or secured to be paid the said freight for the space or period of six months, commencing from the 20th August last, and the said H. C. Sempill being about to leave England in the said ship; I have consented to guarantee the owners of the said ship the payment of the said freight to commence after the said period of six months, which six months is to be accounted from the 20th of August last past; and I do hereby guarantee unto you, on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use or hire of the said ship which shall or may become due and payable from the said H. C. Sempill for any period beyond the said six months, pursuant to such charterparty, such period of six months to commence from the 20th of August last, according to the terms and conditions of the said charterparty; and, in default of the payment

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thereof as aforesaid by the said H. C. Sempill or his agents, I hereby undertake and agree to pay the same on demand. Dated, London, this 6th day of October, 1829. Yours, &c."

At the foot of the above guarantie the defendant wrote and signed the following undertaking:—

"I undertake to get a copy of the above guarantie duly signed by Thomas Potter Macqueen, Esq. M. P., and within a week delivered to Mr. Brittan."

A witness stated that the memorandum on the charter-party, and the undertaking of the defendant to get the signature of Mr. Macqueen to the guarantie for the payment of the freight, were so signed reciprocally in consideration the one of the other. After the transactions which took place at that meeting, the ship set sail, and left England on her voyage on the 10th October, 1829. The defendant never got a copy of the above-mentioned guarantie signed by Macqueen, although repeated applications were made by the plaintiffs to the defendant for that purpose; nor did Macqueen ever sign the same. But the defendant proposed to the attorney for the plaintiffs that he would himself, in lieu of the guarantie by Macqueen, sign the following letter; and he did, in the month of November, 1830, write and sign a letter addressed to W. S. Jacques, of which the following is a copy:—

"Sir,—In consideration of your having, on behalf of yourself and other owners of the ship called the Warrior, entered into a charterparty of affreightment with Mr. H. C. Sempill, for a voyage of the said ship to Swan River and Sidney, New South Wales, whereby it is agreed that the said ship shall remain and continue in the service of the said freighter for and during the term or space of six calendar months at least, to reckon and be accounted from the 12th of July last past, and for and during such longer

time or term, if any, as may be necessary to complete the said intended voyage up to the day of her final discharge; and whereby, after covenanting for payment of the freight for and during the said six months, at the times and in manner therein mentioned, the said H. C. Sempill did covenant that the freight for any period beyond the said six months shall be paid in London by the freighter or his agents, as in the said charterparty mentioned; and whereas the said H. C. Sempill hath paid or secured to be paid the said freight for the space or period of six months, commencing from the 20th of August last, and the said H. C. Sempill being about to leave England in the said ship, I have consented to guarantee the owners of the said ship the payment of the said freight to commence after the period of six months, which six months is to be accounted from the 20th August last past; I do hereby guarantee unto you, on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use or hire of the said ship or vessel, which shall or may become due and payable from the said H. C. Sempill for any period beyond the said six months, such period of six months to commence from the 20th August last, according to the terms and conditions of the said charterparty; and, in default of payment thereof as aforesaid by the said H. C. Sempill or his agents, I hereby undertake and agree to pay the same on demand: it being understood that I am not to be bound by the commander's certificate alone of the amount of freight due, without further proof of such amount being due. Dated the 6th October, 1829. Your's, &c. "J. P. Beavan."

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The ship remained in the service of Sempill under the said terms until the 15th June, 1830, when she finally discharged her cargo at Sidney, New South Wales. There was 1,557l. 9s. 8d. due from Sempill to the plaintiffs for the freight of the ship for a period beyond the six months,

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commencing from the 20th August, 1829; and the defendant had notice thereof before the commencement of this action, and had refused to pay the same.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiffs were entitled to recover under all or any one or more of the counts of the declaration in this action. If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict was to stand either for the said sum of 1,557*l.* 9*s.* 8*d.*, or for nominal damages, as the Court should direct, with liberty to the plaintiffs to enter it up on any one or more of the said counts, as might be thought fit. But, if the Court should be of opinion that the plaintiffs were not entitled to recover in this action, then a nonsuit was to be entered.

The case came on for argument in Easter Term last.

Mr. Serjeant *Wilde*, for the plaintiffs.—1. The charter-party is set out in the first count of the declaration according to its precise terms; and the Court will give it its legal effect. It is not, however, declared on as a cause of action, but is stated as mere matter of introduction: it is properly described to be, as it in fact is, a charterparty made between Jacques for and on behalf of himself and the plaintiffs, other the owners of the ship *Warrior*, of the one part, and Sem-pill of the other part. Considerable latitude is allowed in the setting forth of that which is mere inducement: and here, if the charterparty had not been under seal, it would have been the contract of all the owners, though signed only by one. In *Purcell v. Macnamara*(a), in an action on the case for a malicious prosecution, it was held not to be material to prove the exact day of the acquittal as laid in the declaration; and therefore a variance in that respect between the day laid and the day stated in the record

which was produced to prove the acquittal, was held to be immaterial, the day not being laid in the declaration as part of the description of such record of acquittal. Lord Ellenborough there says: "There are two sorts of allegations; the one of matter of substance, which must be substantially proved; the other of description, which must be literally proved. Certainly there would be a repugnancy [in this case] between the allegation and the proof, if it were to be considered as a specific allegation of time: but, if it be only taken as a substantial allegation of the fact of the acquittal, as of a time which is shewn to have been before the action brought, then the repugnancy is immaterial, and the proof in substance supports the allegation." So, in *Phillips v. Shaw* (*b*), in assumpsit for not indemnifying the plaintiff in consequence of his having become bail for A. in an action at the suit of B., it was stated that B., in Michaelmas Term, 58 Geo. 3, recovered against the plaintiff; and the judgment given in evidence was of Hilary Term: it was held that this was no variance, inasmuch as this was not matter of description, but an allegation in substance that the judgment had been obtained before the commencement of the action. And in *Stoddart v. Palmer* (*c*), where in an action for a false return to a writ of fieri facias, the declaration stated that the plaintiff in Trinity Term, 2 Geo. 4, by the judgment recovered &c., "as appears by the record," and the proof was of a judgment in Easter Term, 3 Geo. 4, it was held that this was no variance; for that the averment "as appears by the record" was surplusage, and might be rejected, inasmuch as the judgment was not the foundation of, but mere inducement to the action. To the same effect are the cases of *Frith v. Gray* (*d*) and *Ditcham v. Chiris* (*e*).

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(*b*) 4 Barn. & Ald. 435.

(*d*) 6 Term Rep. 461, n.

(*c*) 3 Barn. & Cress. 2, 4 Dow.
& Ryl. 624.

(*e*) 1 Moore & Payne, 735, 4
Bing. 706.

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2. As to any objection that may be taken to the maintenance of this action by the plaintiffs, on the ground of the charterparty not being entered into between *the plaintiffs* and Sempill, but between Jacques alone and Sempill—it is sufficient to remark that this is not an action in which the plaintiffs seek to enforce the charterparty as against Sempill; but the action is brought for the breach of a collateral guarantie.

3. The consideration stated in the first count is substantially proved by the written documents set forth in the case. The consideration was the execution of the charter-party by Jacques on behalf of himself and the other owners of the ship—the consent of the plaintiffs that the freight should be payable from a period later than that originally agreed upon—and their permitting Sempill to sail in the Warrior without giving the security they had originally required for the freight beyond the six months; for, although the agreement was not reduced into writing, still it was entered into before the sailing of the vessel.

4. The promise by the defendant to procure the signature of Macqueen to the guarantie was not an undertaking for the debt, default, or miscarriage of another within the meaning of the statute of frauds, it was an original undertaking on the part of the defendant to procure a third person to do an act which he was not bound to do, and his failure to do which would not constitute a default.

5. The consideration for the promise stated in the guarantie intended to be signed by Macqueen, is sufficiently expressed on the face of the memorandum, coupled with the letter of the 2nd October addressed by the defendant as Macqueen's attorney to one of the plaintiffs. Part of that consideration was, the postponement of the day from which the payment of freight was to commence, and the removal of the stop that the plaintiffs had put upon the ship. Whether the consideration for Macqueen's signing the guarantie was sufficient or not is quite imma-

terial; the question is whether there was sufficient consideration for the defendant's undertaking. Contracts of this description that are made by the parties in the hurry of business are not to be construed with the same strictness or scanned with the same measure of criticism as the more formal documents that are prepared with deliberation and under competent advice—*Redhead v. Cator* (*f*), *Stadt v. Hill* (*g*), *Wilson v. Hart* (*h*), *Boehm v. Campbell* (*i*), *Pace v. Marsh* (*k*), *Coe v. Duffield* (*l*), *Benson v. Hippius* (*m*), *Newbury v. Armstrong* (*n*).

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Mr. Serjeant Coleridge, contra.—1. The charterparty is improperly set forth in the first count of the declaration as a charterparty entered into by Jacques for and on behalf of himself and the other owners of the Warrior. He who professes in pleading to set out a deed, must set it out according to its legal effect and operation: it is not enough that it is set out in *hæc verba* (*o*). The charterparty here was not in its legal effect a contract between *the plaintiff's* and Sempill, as is alleged; but a contract between Jacques and Sempill—Sempill covenants with Jacques only. One tenant in common, part-owner, or partner cannot bind the others by deed—*Harrison v. Jackson* (*p*), *Metcalfe v. Rycroft* (*q*). In *Berkeley v. Hardy* (*r*), where an indenture was made between "A. for and on behalf of B. on the one part, and C. on the other part," A. being thereunto authorised by writing under B.'s hand, but not under seal, and A. executed the deed in his own name: it was held

(*f*) 1 Stark. N. P. C. 14.

(*n*) 3 Moore & Payne, 509, 6

(*g*) 9 East, 348.

Bing. 201.

(*h*) 1 J. B. Moore, 45.

(*o*) 2 Wms. Saund. 97 b. note

(*i*) 3 J. B. Moore, 15.

(2).

(*k*) 1 Bing. 216, 8 J. B. Moore,
59.

(*p*) 7 Term Rep. 207.

(*l*) 7 J. B. Moore, 252.

(*q*) 6 Mau. & Selw. 75.

(*m*) 1 Moore & Payne, 246.

(*r*) 5 Barn. & Cress. 355, 8

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that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B. So, in *Steiglitz v. Egginton* (*s*), it was held that an authority to execute a deed must be by deed; and if one partner acknowledge that he gave another partner authority to execute a deed for him, the presumption is that it was a legal authority, which must be under seal and produced: an acknowledgment is not sufficient.

2. The rights of the parties should be reciprocal: and here Sempill could have no remedy against the plaintiffs on the charterparty; consequently, neither could they sue him. And by parity of reasoning they must also be held to be precluded from suing in respect of a cause of action founded upon or arising out of the charterparty.

3. The consideration stated in the declaration failed in proof. One part of the supposed consideration was the plaintiff's releasing Sempill from the freight accruing prior to the 20th August; and the promise to give this release and to permit the vessel to sail without Sempill's giving the additional security which the plaintiffs had required, was not made either by the plaintiffs or by Jacques, the individual executing the charterparty, but by Cross, another of the partners, who was in point of law a total stranger to it.

4. Then, as to the statute of frauds—It is said that this is not an undertaking to be answerable for the debt, default, or miscarriage of another, but only an undertaking to procure another person to enter into a contract of that nature. There was no liability on the defendant, no consideration or inducement for him to give the undertaking in question—no loss or detriment to the plaintiffs, no benefit to the defendant or to any third person. The consideration for the promise as well as the promise itself should have appeared on the face of the memorandum—*Wain v.*

Wartiers (*t*). Here, the consideration stated on the face of the *guarantie* was by-gone: the charterparty had already been executed by Jacques; the alteration in the day from which the freight was to begin to be payable was already agreed upon; and the vessel had sailed. If Macqueen, therefore, had signed the *guarantie*, he could not have been sued upon it; consequently there is no consideration for the defendant's promise. It is a general rule of law, that, where a deed is made *inter partes*, no person can maintain an action upon the deed who is not a party to it. In *Scudamore v. Vandenstene* (*u*) it was held that one of two covenantees who had sealed the indenture, but was no party to it, could not release the covenantor; à fortiori he could not sue him.

5. As to the counts framed upon a direct *guarantie* given by the defendant—his contract is liable to the same objection (the want of consideration) as the *guarantie* of Macqueen. But, assuming the defendant to be liable to these plaintiffs for his default in not procuring the signature of Macqueen, inasmuch as the *guarantie* to be signed by Macqueen was one that could not have been enforced against him, the defendant can at all events only be liable to nominal damages for failing to procure a signature that would have been utterly valueless.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This is an action of *assumpsit* brought by the plaintiffs to recover damages for the breach by the defendant of a promise to procure one Thomas Potter Macqueen to sign a written *guarantie*, and to cause the same to be delivered to the plaintiffs within a certain time. The plaintiffs have also declared in some of the counts upon a *guarantie* given by the defendant himself, but it appears to

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(*t*) 5 East, 10. (*u*) 2 Inst. 673. 2 Rol. Abr. 22, "Faits," (F.) 1.

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us that the principal question arises on the promise to procure the guarantie of another, as set out in the first count of the declaration. Many objections have been urged against the plaintiffs' right to recover upon that count. In the first place, it is objected that the charterparty set out in that count is misdescribed. The first count states it to be a charterparty under seal "made between Richard Singer Jacques for and on behalf of himself and the said plaintiffs, other the owners of the said ship or vessel called the Warrior, of the one part, and Sempill, the freighter of the ship, of the other part :" and it proceeds to allege that by such charterparty "it was witnessed that Jacques, acting as aforesaid, did agree with the freighter" that the ship should receive a cargo from the freighter, and sail on the voyage specified in the charterparty. The charter-party having been pleaded in the very terms in which it is made, the objection of misdescription, which resolves itself into an objection of variance between the deed as stated on the record and the deed produced in evidence, cannot apply to the present case. But it is further urged in argument, that the party who pleads a deed must plead it according to its legal operation, and not in the words of the deed itself; and that, by pursuing the latter course, the deed is improperly set out. Now, although it is undoubtedly true (*x*), that, where a deed may operate different ways, the party who pleads it is bound to plead it as he intends to use it, and not to leave it to the Court to draw the inference from the deed itself; yet, in the present case, the plaintiffs have in effect so pleaded it; for, the other owners not being made parties to the deed, and not having executed it, the legal operation of the charter-party was, that it was the agreement of Jacques only, though made, as the deed purports, and as the declaration

(*x*) See all the authorities upon this subject collected in the note to the case of *Chester v. Willan*, 92 Wms. Saund. 97, n.

states, on behalf of himself and the other joint owners of the vessel.

It is objected secondly, that, upon the face of the count itself, the present action must fail, because, as the persons who are plaintiffs in the action could not have sued Sempill upon the charterparty, so they cannot sue upon the cause of action stated in that count. It must be admitted, on the authority of the cases cited in the argument, that, the deed not having been executed by the several plaintiffs, and the plaintiffs not having been expressed to be parties to it, they could neither sue or be sued thereon. But, as the present action is not brought upon the charterparty, but upon a new contract made directly between the defendant and the plaintiffs, which contract is perfectly collateral to the contract contained in the charterparty, we think it is by no means a necessary consequence, that, because the plaintiffs could not have sued upon the original charterparty, therefore they cannot become plaintiffs in an action brought on the new contract. The ground of the present action is, not that the former charterparty was executed by the plaintiffs, but that a charterparty had been executed by one of the joint owners for the rest, and that all the joint owners had acted upon the stipulations of that charterparty—that they had allowed the freighter to take possession of the ship in pursuance of the charterparty; to put his goods on board the ship; had allowed the ship to sail, and the voyage to be performed; and had in fact adopted the charterparty in the same manner and to the same extent as if they had been made parties to and had executed the same. Under these circumstances, we see no objection, if a collateral promise is made between the defendant and the plaintiffs for the payment of the freight, that such promise should be made the ground of an action in the name of all the joint owners to whom such promise was made, notwithstanding the same plaintiffs could not have maintained an action in their own names for the non-

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compliance with the stipulations in the original charter-party. No authority has been cited to that effect; and we see no objection on general principle to such their right to sue.

It is thirdly objected, that the consideration as stated in the first count has not been proved. Upon looking, however, at the terms in which the consideration is alleged, and at the facts as stated in the special case, we think there is no substantial or material variance between them. The consideration is alleged to be, first, "in consideration of the premises." This includes the execution of the charterparty by Jacques on behalf of himself and the other part owners of the ship, and the disputes and differences which had taken place as to the freight. Now, these facts are proved by the written documents set forth in the case, and by the allegations therein contained. A further consideration for the promise is stated to consist of the consent and agreement of the plaintiffs that the period of hire of the ship should commence from the 20th August, 1829, and the payment of freight from the same day, and that Sempill should not be liable for any charge for the freight antecedently to that day. This, again, is proved from the statements in the case. And lastly it is alleged as part of the consideration, that the plaintiffs would permit Sempill to leave England in the ship without giving the security that had been required. Now, although this is not stated expressly and in terms in the special case, yet it appears to us to be the necessary inference from the two facts found in the case, that the plaintiffs had refused to allow the ship to go to sea until the settlement of the disputes and differences, and that she was afterwards, upon the undertaking of the defendant to get Macqueen's guarantie, permitted to set sail and to leave England on her voyage, on the 10th October, 1829. The consideration, therefore, as stated in the first count, appears to us to have been substantially, if not accurately proved.

It is next objected that the promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another person, and that no action is maintainable upon it, according to the well known rule of law, because the consideration for the promise does not appear in writing, as well as the promise itself. The promise upon which the first count is framed is an undertaking by the defendant to get a copy of a garantie which is written above it, duly signed by Mr. Potter Macqueen, and within a week afterwards delivered to the plaintiffs' agent. The immediate consideration for that promise was, the removal by the plaintiffs of a stop which they had put upon the vessel, then lying in St. Katherine's Dock, and the permitting her to sail on the voyage, before the security was signed. Under these circumstances, the contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person; but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen had signed the garantie, that garantie would indeed have been within the statute of frauds, for, his is an express garantie to be answerable for the freight due under the charterparty, if Sempill did not pay it. But no person could be answerable on the promise to procure his signature, but the defendant: Sempill had never engaged to get the garantie of Macqueen; nor had Macqueen engaged to give it. There was therefore no default of any one for which the defendant made himself liable; but he did so simply upon his own immediate contract: for, as to any default of Sempill in paying the freight, the action on the undertaking of the defendant could not be dependent upon that event, for it would have been maintainable if the garantie were not signed at any time after the day on which the defendant engaged it should be given—that is, long before the time when the freight became payable. But we think the intended garantie of Macqueen is itself an agreement within the statute of

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frauds; and, consequently, in order to ascertain the amount of damage which the plaintiffs have sustained by reason of its not having been given, we must be satisfied that it is such a *guarantie* as could itself be made the ground of an action: but, after careful examination, we think there is no consideration upon the face of it, either directly expressed, or to be supplied by fair and necessary inference. All the expressions in it refer to matter that is past, and not to any thing that is future or prospective. The *guarantie* states that the plaintiff Jacques *had* entered into the charterparty which is there recited; it then states that Sempill had paid the six months' freight, and that Sempill was about to leave England in the ship. This is the whole of the written letter which can by any construction be held to refer to consideration. But this is no more than a statement of facts which had already taken place at the time of the *guarantie* given. It is all past and by-gone consideration. Nothing appears on the agreement to move for the promise on the part of Macqueen which is either beneficial to Macqueen or detrimental to the plaintiffs. Reading, therefore, this letter of *guarantie* with the desire to discover the mind and intention of the writer, we cannot by any necessary intendment extract from it any ground of consideration as between the plaintiffs and Mr. Macqueen; and we cannot think the letter of the defendant written on the 2nd October could be called in aid to make out such consideration, merely upon the statement in the case that the defendant was at that time acting as the attorney for Sempill and for Mr. Macqueen; such a statement being by no means equivalent to what is required by the statute of frauds—that it must be “signed by the party to be charged therewith, or some other person *thereunto* by him lawfully authorized.” We therefore think, that, if an action had been brought against Macqueen upon his *guarantie*, such action must have failed: and the consequence is, that the present defendant is liable to a

verdict against him on the first count, upon the ground that he has broken an original contract; but that he is liable to nominal damages only, upon the principle laid down in *Marzetti v. Williams* (y).

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As to those counts of the declaration which are framed upon a direct guarantie given by the defendant himself, it is sufficient to observe that his contract is liable to the same objection as that above stated to the guarantie of Macqueen. But it may further be answered that the defendant's guarantie was not given until after the ship had been allowed to sail, that is, until after the consideration had taken place; for, the letter was not written until the month of November, whereas the ship was allowed to sail on her voyage on the 10th October preceding. And, although it may be true, as was urged in argument, that it is of no consequence that the agreement was not reduced to writing until long after it was made, nothing more being necessary than that an agreement in writing should be produced in evidence at the trial of the cause; yet in this case the defendant's guarantie was not only not written, but never entered into or given until long after the ship had been allowed to sail, that is, long after the alleged consideration for giving it had taken place. His guarantie was never thought of at the time, nor until long after, when it was found impossible to get Macqueen's. Such guarantie, therefore, appears to have been given without any consideration whatever.

Upon the whole, therefore, we think the verdict ought to stand for the plaintiffs upon the first count, but that the damages ought to be reduced to one shilling.

Rule accordingly.

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By the 6 Geo. 4. c. 62, s. 2, a duty of one-fifth part of the sum charged to the hirer, or 1s. 9d. for each horse, is payable on a letting to hire to go no greater distance than eight miles from the place of letting. By the 8th section the commissioners of stamps are directed to deliver to every postmaster printed forms, which the latter is by s. 30 required to return weekly filled up with, amongst other things, the amount of the sum charged for the hire, and the number of horses let for hire—"and shall be answerable and accountable for one-fifth part of such sum of money so charged, or for the sum of 1s. 9d. for each horse so let for hire; and shall enter such one-fifth part of

such sum charged or the sum of 1s. 9d. for each horse, as and for the duty payable in respect of any horse so let for hire." By s. 12, the postmaster is required to give bonds in a penalty for rendering true accounts; and by ss. 33 and 34, the farmer of the duty is authorized to require him to verify his account on oath before a magistrate. The defendant, a postmaster, in his weekly return inserted the sum of 2s. 6d. as the duty payable for two horses hired for a distance of five miles, without stating the sum charged for the hire:—Held, that he had an election to charge himself either with the duty of 1s. 9d. per horse or one-fifth of the hire; and that, by the non-insertion of the fixed duty in the return, he had sufficiently declared his election to be charged with a fifth of the hire, and (no fraud being suggested) was not, by reason of his omission to insert in the return the amount of the hire, chargeable with the duty of 1s. 9d. per horse.

HAMMOND v. HOOLEY.

THIS was an action of assumpsit for money had and received for post-horse duties. At the trial before Mr. Baron Bayley, at the Chester Spring Assizes, 1833, a verdict was found for the defendant. Upon a motion for a new trial, it was directed that the opinion of the Court should be taken on the following case:—

The plaintiff was, during the whole period over which the demand extended, the farmer of the post-horse duties for the counties of Chester and Lancaster. The defendant was a postmaster letting out horses for hire at Knutsford in the county of Chester, and within the district of the plaintiff. From the 7th of February, 1828, to the 25th of January, 1831, the defendant let to hire on various occasions divers horses, to go no greater distance than eight miles from the place of letting to hire. On each of those occasions such horses were let to take out and bring back the persons hiring them; and on each occasion actually did bring back one or more persons.

Blank forms for the weekly returns of duties, prepared according to the directions of the 8th section of the 4 Geo. 4, c. 62, were from time to time delivered to the defendant by the collector for the plaintiff, which were filled up by the defendant and periodically delivered back to the collector. In those returns, such lettings as are above described, viz. to go no greater distance than eight miles, and

bring back, were entered according to the following scale:—

Month and day of the week.	Day of month.	Description of carriage.	No. of carriage.	Character and description of the carriage, & whether it was hired by the day, or otherwise, and for what time, not stated.	To what place hired to go, and return, if so hired.	Sum charged.	Post work.		Day work.			Amount of duty. s. d.
							No. horses.	No. miles.	No. horses.	No. miles.	No. days.	
Dec.	26	Chaise.		Charles.	Castle and back. Tabley and back.	2	5					2 6
—	29	Ditto.		Elijah.		2	3					2 0

The sums thus returned as the amount of duty payable upon such lettings to hire respectively were every six weeks, during the whole period covered by this action, paid by the defendant to the collector of the plaintiff. In none of the entries so made by the defendant and delivered to the plaintiff which relate to the several lettings above described, was there any statement of the sums charged to the hirer for such letting to hire.

By the 2nd section of the 6 Geo. 4, c. 62, there is imposed for every horse let for hire to go no greater distance than eight miles from the place of letting for hire every such horse, a duty of one-fifth part of the sum charged for such letting for hire, or one shilling and nine-pence for every horse: and upon every horse let for hire to go no greater distance than eight miles from the place of letting, where such horse shall not bring back any person, and shall not deviate from the usual line of road between the place of letting and the place to which every such horse shall be hired to go, the sum of one shilling. By the 8th section, it is enacted "that the commissioners, at the time of issuing any license, shall deliver or cause to be delivered to every post-master or other person to whom such license shall be granted as aforesaid, printed or written papers intituled 'Stamp-office weekly accounts,' which shall be adapted for the insertion of the following particulars relating to the horses which may be let for hire, viz. the day

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of the month, the month, and the year of such letting for hire, the names of the towns or places from which and to which, or from which and to which and back again, according as the hiring may be, the number of every carriage required by this act to be numbered, the Christian and surname of every postillion or driver employed, the amount of the sum charged for or in respect of every letting for hire, the number of horses let for hire, the number of days and the number of miles for which such horses shall be let for hire, and the amount of the duty payable for and in respect of every such letting for hire, as the case may be or shall require, according to the following or such other form as the said commissioners shall judge convenient for keeping the accounts." By the 12th section, the postmaster is required to give bonds in a penalty for rendering a true account. And by the 30th section it is enacted, "that, from and after the 31st January, 1824, every person letting horses for hire as aforesaid shall insert and set forth in his Stamp-office weekly account the several particulars following; that is to say, whenever he shall let for hire by the *mile* any horse, the day of the month, the month, and year for which such horse shall be let for hire, the names of the towns or places from which and to which, or from and to which and back again, such horse shall be hired to go, the number of every carriage which he shall furnish with any such horse (if by this act required to be numbered), the Christian and surname of every postillion or driver employed therewith, the number of horses so let for hire, and also the amount of the duty payable for and in respect of every such letting for hire; and, whenever such person letting horses for hire as aforesaid shall let any horse for hire *for a day or less period of time, to be used within the distance of eight miles from the place of letting for hire such horse as aforesaid, for the purpose of drawing any carriage carrying any person as aforesaid, he shall insert and set forth in his*

Stamp-office weekly account the several particulars following (that is to say), the day of the month, the month, and year on which such horse shall be let for hire, the number of every carriage, if by this act required to be numbered, the Christian and surname of every postillion or driver employed with such horse, the number of horses so let for hire, and the amount of the sum charged for such letting for hire; and shall be answerable and accountable for one-fifth part of such sum of money so charged, or for the sum of one shilling and nine pence for each horse so let for hire; and shall enter in his Stamp-office weekly account such one-fifth part of such sum charged, or the sum of one shilling and nine pence for each horse, as and for the duty payable in respect of any horse so let for hire as aforesaid; and, whenever such person or persons letting horses for hire as aforesaid, shall let for hire any horse to go no greater distance than eight miles from the place of letting for hire such horse, where such horse shall not bring back any person or persons, and shall not deviate from the usual line of road between the place of letting and the place or distance to which such horse shall be hired to travel or go, for the purpose of drawing any carriage or vehicle conveying any person as aforesaid, he shall insert and set forth in his Stamp-office weekly account the several particulars following (that is to say), the day of the month, and month and year on which such horse shall be so let for hire, the number of every carriage, if by this act required to be numbered, the Christian and surname of every postillion and driver employed with such horse, the number of horses so let for hire, and also the amount of the duty payable for and in respect of every such letting for hire as aforesaid."

The duty prescribed in the 30th section is the same as that in the 2nd. The statute then goes on to prescribe the mode of weekly accounts in cases of letting of horses for less than twenty-eight days, and in cases of letting of

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horses for twenty-eight days and more. By the 33rd and 34th sections, the farmer of the duty is authorized to require the postmaster to verify his account on oath before a magistrate.

The question for the opinion of the Court was, whether, by virtue of the act of the 4 Geo. 4, c. 62, the defendant was liable to pay, in respect of each letting to hire of any horse for no greater distance than eight miles, such horse being hired to bring back, and actually bringing back some person, the sum of one shilling and nine pence for each horse so let to hire as aforesaid. If the Court should be of opinion that he was so liable, then a verdict was to be entered for the plaintiff for 20*l.* 5*s.* 3*d.*, being the difference between the several sums paid and those which on that principle ought to have been paid by the defendant to the plaintiff for the duties on such lettings. If the Court should be of a contrary opinion, then the verdict was to stand for the defendant.

Mr. Lloyd, for the plaintiff.—By the second section of the statute an option is given to the postmaster to charge himself in the accounts rendered by him with a duty in a case like the present of one shilling and nine pence for each horse, or one-fifth of the sum he receives for the hire of the chaise. But by the 30th section, where he elects to charge himself with the last-mentioned duty, he is bound to insert in the proper column the sum so received by him. Failing to do this, he must be taken to have made his election to be charged with the other duty, of one shilling and nine pence for each horse: for, unless the sum charged for the hire appears on the face of the return, the farmer of the duties has no means of calculating whether or not the sum be correctly entered—no means of preventing fraud.

Mr. John Jervis, contrâ.—The option given to the post-

master by the statute is not to be determined by any omission or insertion in the weekly stamp-office account. At the most, the defendant has only been guilty of a breach of a fiscal regulation, that is enforced by a penalty; for, by the 12th section of the statute, the postmaster is required to give bond in a penalty of 50*l.* for rendering true accounts. If any fraud were charged, the proper course for the plaintiff would have been to pursue his remedy on the bond. Besides, by the 34th section, the plaintiff had power to summon the defendant before a magistrate, and compel him to swear to the truth of the accounts rendered by him.

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Mr. *Lloyd*, in reply.—The plaintiff could derive no benefit from seeking to enforce the penalty mentioned in the bond; the bond being given to the crown, and not to the farmer of the duties. The defendant clearly has not complied with the statute by inserting the gross amount of the hire, so as to shew what proportion to it the sum which he has debited himself with bears; and therefore he must be taken to have elected to be charged according to the other mode pointed out by the act.

Lord Chief Justice TINDAL.—The question in this case arises on the construction of the 2nd section of the statute 4 Geo. 4, c. 62, compared with the form directed by the 8th section to be delivered by the commissioners to the postmaster. By the 2nd section there is imposed for every horse let for hire, to go no greater distance than eight miles from the place of letting to hire every such horse, a duty of one fifth part of the sum charged for such letting for hire, or one shilling and nine pence for every horse. There is therefore, as is conceded on the part of the plaintiff, an option given to the party chargeable with the duty whether he will pay the duty of one shilling and nine pence for each horse, or one fifth of the sum charged to

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the hirer of the chaise: and the only question is, whether, on the return he has made, the postmaster has exercised this option, so as to shew that the sum he has inserted therein for the amount of duty is one fifth of the amount earned. He has filled up the return with the number of horses, the number of miles, and the amount of the duty. It is clear that he has not elected to be charged with the duty of one shilling and nine pence for each horse, the sum he has returned for two horses being only two shillings and six pence. How, therefore, are we to say that he is to be charged with the fixed duty? It is contended on the part of the plaintiff, that, as the defendant has omitted to state in his return the gross sum received by him for the hire of the horses, the farmer of the post-horse duties has no means of ascertaining whether or not the sum is fairly charged. But are we therefore to draw the uncertain inference that the defendant elected to charge himself with the duty of one shilling and nine pence for each horse? On the contrary, I think there is reason to believe that he has properly charged himself with one fifth of the hire. Twelve shillings and six pence would be about the sum that would be charged for a postchaise for five miles out and back. We are not to assume that the defendant has committed a fraud, particularly when the statute has pointed out so easy a mode by which the farmer may prevent fraud, viz. by summoning the postmaster before a magistrate, and making him verify his return on oath. It therefore seems to me that the plaintiff has failed to establish his right to a verdict.

Mr. Justice PARK.—No doubt the postmaster would have acted more properly had he inserted in his return the sum received by him for the hire of the chaise: at first I was inclined to think that his having omitted to do so, rendered him liable to this action; but, on looking at the statute, and seeing that no fraud could have been com-

mitted, I have changed my opinion. It was very easy for the collector, the data being given, to calculate what the sum paid for the hire was: and, if he had reason to suspect unfair dealing, he might have compelled the defendant to verify his return before a magistrate.

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Mr. Justice GASELEE.—When I read the case first, I thought the plaintiff entitled to recover, upon the 30th section of the act. But, upon reconsidering the matter, I do not think the words of that clause are so clear as to induce me to differ in opinion from the rest of the Court. It certainly did occur to me, that, inasmuch as the defendant had omitted to insert in his return the amount received by him for the hire of the chaise, so as to enable the farmer or collector of the duties to judge whether or not he had charged himself with a sufficient sum for the duty, he had not declared his election to pay the one fifth. But, at all events, it is clear that he did not elect to charge himself with the duty of one shilling and nine pence per horse.

Mr. Justice BOSANQUET.—I am also of opinion that the defendant is not chargeable on the return made by him with the duty of one shilling and nine pence per horse. It is admitted that he had an option to charge himself either with that duty or with one fifth part of the sum received by him for the hire of the chaise: but it is contended, that, upon the face of his return, he has elected to charge himself with the former duty. The return, however, seems to me expressly to negative that supposition. The argument on the part of the plaintiff is, that the defendant ought to have inserted in the column of the printed form of return applicable to that purpose the amount of his charge for the hire; and that his having failed so to do implies an election on his part to debit himself at the rate of one shilling and nine pence for each horse. But, I cannot see that, because he has omitted to mention the

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amount of the hire, we are to assume that he did not mean to charge himself with a fifth, especially when we see that the sum inserted in the return is inconsistent with the former rate of charge, and exactly coincides with that which as far as we know is the ordinary charge for a five mile journey. If the farmer entertained any suspicion as to the bona fides of the transaction, he might have required the defendant to fill up the return more completely, and to verify it on oath.

Judgment for the plaintiff.

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The plaintiffs, lessees of premises under a demise with a covenant not to suffer certain trades to be carried on therein, amongst others those of a "common brewer" or "retailer of beer," without the license of the lessor, under-leased to the defendant, who covenanted in like manner not to carry on the trades prohibited without the license of the plaintiffs. The defendant (under a license from the plaintiffs) carried on the business of a "retail brewer" on the demised premises; whereupon the superior landlord brought an ejectment for the supposed forfeiture, which not being defended, he obtained possession:—*Sembly*, that this recovery in the ejectment by the superior landlord was no answer on the part of the defendant to a demand for rent by his lessors—a "retail brewer" not being within the proviso in the original lease.

SIMONS and Another v. FARREN.

THIS was an action of covenant brought to recover rent for two years and a half, alleged to be due from the defendant to the plaintiff under and by virtue of an indenture of demise bearing date the 9th July, 1830. The defendant craved oyer of the deed, which was set out upon the record—containing a covenant on the part of the defendant as lessee, that he would not, at any time during the term thereby granted, set up, use, exercise, or carry on, or permit or suffer to be set up, used, exercised, or carried on, or followed, in, upon, or about the messuage, tenement, or dwelling-house and premises thereby demised, or any part thereof, the trade or business of [here followed an enumeration of a great variety of trades, and amongst them those of] "a common brewer," and "a retailer of beer, ale, or spirituous liquors," without the leave, license, and consent in writing of the plaintiffs (the lessors), their executors, administrators, and assigns, first had and obtained. The defendant

then pleaded, that, long before the making of the said indenture of lease in the declaration mentioned, one R. Chantrell and Mary Ann his wife, were seised, in right of the said Mary Ann, in their demesne as of fee of and in the said messuage, tenement, or dwelling-house in the declaration mentioned; and, being so seised, theretofore, to wit, on the 21st December, 1815, at &c., by a certain indenture then and there made between R. Chantrell and Mary Ann his wife of the one part, and S. Ponder of the other part (which said lease, sealed with the seals of the said R. Chantrell and Mary Ann his wife, the defendant then brought there into Court), the said R. Chantrell and Mary Ann his wife did demise, lease, set, and to farm let the said messuage, tenement, or dwelling-house, with the appurtenances, in the declaration mentioned, unto S. Ponder, his executors, administrators, and assigns, to have and to hold the same with the appurtenances unto the said S. Ponder, his executors, administrators, and assigns, from the 24th June then last for and during and unto the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended: and the said S. Ponder, for himself, his heirs, executors, administrators, and assigns, did, in and by the last-mentioned indenture, amongst other things, covenant, promise, and agree with and to the said R. Chantrell and Mary Ann his wife, and the heirs and assigns of the said Mary Ann, that he, the said S. Ponder, his executors, administrators, or assigns, should not, at any time during the term by the said last-mentioned indenture granted, set up, use, exercise, carry on, or follow, or permit or suffer to be set up, used, exercised, carried on, or followed, in, upon, or about the messuage, tenement, or dwelling-house and premises thereby demised, or any part thereof, the trade or business of (amongst others) a common brewer or retailer of beer, ale, or spirituous liquors, without the leave, license, and consent of the said R. Chantrell and Mary Ann his wife and the heirs and as-

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signs of the said Mary Ann, in writing under his, her, or their hands or hand for that purpose first had and obtained: and in and by the said last-mentioned indenture it was provided always, and the said last-mentioned indenture was declared to be upon the express condition, that, if the said S. Ponder, his executors, administrators, and assigns, should not in all things well and truly perform, fulfil, observe, and keep all and every the covenants, clauses, conditions, provisoës, and agreements in the said last-mentioned indenture contained on his and their parts and behalves to be paid, performed, fulfilled, observed, and kept, then and from thenceforth, and in either of the said cases so happening, the term, estate, and interest, and lease by the said last-mentioned indenture granted, should from thenceforth cease and determine and be utterly void, and from thenceforth it should and might be lawful to and for the said R. Chantrell and Mary Ann his wife, and the heirs and assigns of the said Mary Ann, into or upon the said messuage, tenement, or dwelling-house, or any part thereof in the name of the whole, wholly to re-enter: that the plaintiffs, after the making of the said indenture in the declaration mentioned, to wit, on &c., at &c., by a certain license or consent in writing, did authorize and permit the defendants to use and exercise the trade of a *retail brewer* upon the said messuage, tenement, or dwelling-house in the declaration mentioned; that, on the day and year last aforesaid, at &c., the defendant entered on the same premises demised to him as aforesaid, and did then and there, before any of the rent in the said declaration mentioned became due and payable, use, exercise, carry on, and follow the said trade of a *retail brewer*, and that, whilst he was in the possession and enjoyment of the said premises as aforesaid, and whilst he was so using, exercising, carrying on, and following the said trade of a *retail brewer* as aforesaid, and by reason and on the ground that the defendant so carried on the said business of a *retail brewer* as aforesaid, and the

forfeiture of the said lease secondly above mentioned occasioned thereby, one Robert Dennis Chantrell, having good right and title to the demised premises with the appurtenances as eldest son and heir at law to the said Mary Ann, and before any part of the rent in the declaration mentioned became due and payable, to wit, in Michaelmas Term, 1 Will. 4, commenced an action of trespass and ejectment in the Court of our lord the king before the king himself at Westminster, in the name of one John Doe as lessee of him the said Robert Dennis Chantrell, against one Richard Roe, a casual ejector, for recovering the possession (amongst other things) of the said messuage, tenement, or dwelling-house in the declaration mentioned, with the appurtenances, and caused a declaration in the said action to be delivered to the defendant, the tenant in possession of the demised premises with the appurtenances ; and such proceedings were thereupon had in the said Court, that he, the said Robert Dennis Chantrell, in the name of the said John Doe, his lessee aforesaid, to wit, in the term of the Holy Trinity, 1 Will. 4, by the consideration of the same Court, recovered against the said Richard Roe a certain term then to come (amongst other things) of and in the said demised premises, with the appurtenances ; and afterwards, in the same term, a certain writ of our Sovereign Lord the King issued out of the said Court upon the said judgment, to cause John Doe, as lessee of Robert Dennis Chantrell, to have full possession then to come (among other things) of and in the said demised premises with the appurtenances as aforesaid : and thereupon the defendant, being so tenant in possession of the said demised premises with the appurtenances, afterwards, and before any part of the said rent became due from the defendant to the plaintiffs, to wit, on the 5th August, 1831, at &c., according to the form of the statute in that case made and provided, did attorn and become tenant to the said Robert Dennis Chantrell (amongst other things) of and for the said messuage, tene-

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ment, and dwelling-house, with the appurtenances, and held and enjoyed the same as tenant to the said Robert Dennis Chantrell from thenceforth; whereby the term of years in the said indenture of lease in the said declaration mentioned from thenceforth wholly ended and determined: And this &c.

Replication—that the supposed license or consent in writing in the plea mentioned was and is subject to a certain promise therein contained, and which said supposed writing or consent in the said plea mentioned, and which said proviso in the said replication mentioned, were and are in the words and figures following, that is to say: “We do hereby authorize and permit Mr. James Farren to use and exercise his trade of a *retail brewer* upon the premises comprised in a certain indenture of lease of even date herewith, and demised to him for the term of six years (wanting seven days) from Midsummer last; and we undertake not to molest or disturb the said James Farren, his under tenants or assigns, in his or their possession, notwithstanding any such occupation of the said premises may be contrary to the proviso in such lease contained: Provided always, nevertheless, that this authority is not to exempt or be construed to exempt the said James Farren or his executors or administrators from any liability under his covenant contained in the said indenture of lease, in case the original lessor or his assigns should commence any proceedings for the breach of any such covenant or proviso as contained in the original lease. As witness &c.” And this &c.

General demurrer and joinder.

The Court suggested that a retail brewer and a common brewer were not the same, and therefore that the ejectment mentioned in the plea might have been defended, and called upon—

Mr. Watson, to support the plea.—He contended, that, though the trade of a retail brewer and that of a common

brewer might be different, yet that a retail brewer was a retailer of beer, and therefore that the carrying on of that trade operated a forfeiture of the lease.

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SED PER CURIAM.—Before the passing of the statute 4 Geo. 4, c, 52, there was no such person known as a retail brewer. That act was (amongst other things) passed for the amendment of the laws of excise relating to brewers and retailers of beer. The 6th section enacts “that it shall and may be lawful for any brewer or brewers of strong beer only in Great Britain for sale, who shall have taken out and paid for his, her, or their license to brew at and after the rate of 2*l.* at the least, to retail such beer from the premises where such beer is or has been brewed,” and “for any person *not* being a brewer of beer either for sale or private use, to sell strong beer only brewed by any other brewer in casks containing no less than five gallons, or in not less than two dozen reputed quart bottles at one time, upon such brewer or other person respectively taking out under the provisions of this act such respective excise license for the purpose as before mentioned.” The clause also contains a proviso that such licenses shall not authorize the selling of beer to be drunk on the premises. The 9th section enacts, “that no licensed brewer of beer for sale, who shall also be duly licensed to retail such beer under this act, shall sell, deliver, or send out, at or from his, her, or their brewery, on the premises belonging thereto or entered as aforesaid, or to any of his, her, or their customers, any beer in any quantity less than a whole barrel, except between the hours of six o’clock in the morning, and nine o’clock in the evening, &c.” From these enactments it would seem that a common brewer is one who brews and sells beer in large quantities—a retail brewer, one who brews and sells the beer brewed by him by retail—and a retailer of beer, one who sells by retail beer brewed by another person. It therefore seems to us that the carrying on the business of a “retail brewer” was

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not a breach of the covenant not to carry on in the demised premises the trade or business of a "common brewer" or a "retailer of beer." Conditions of re-entry are always construed strictly. The plea, therefore, setting up a recovery in the ejectment by reason of that which might be no breach of covenant at all, seems to be bad: the defendant ought to have defended the ejectment.

Leave to amend, on payment of costs.

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To a plea of coveture, the plaintiff replied that the husband was an alien, that, at the time of the contracts, he resided beyond seas, that the defendant lived in this kingdom separate and apart from him as a femme sole, and that she made the contracts declared on as such femme sole:—Held, no answer to the plea, it not appearing that the absence of the husband was permanent.

STRETTON v. BUSNACH.

DEBT for use and occupation. Plea—that, before and at the time of the making of the several supposed contracts in the declaration mentioned, the defendant was the wife of one Moise Busnach, to wit, at &c. Replication—that the said Moise Busnach was an alien born in foreign parts out of the allegiance of our lord the king, and within the allegiance of a foreign state, to wit, in the kingdom of Barbary, and not a subject of our said lord the king by naturalisation, denization, or otherwise, to wit, at &c.; that Moise Busnach, so being such alien born, long before and at the time of making the said several contracts in the declaration mentioned, and each and every of them, and from thence hitherto, lived and resided in parts beyond the seas, to wit, in the kingdom of France; and that, during all that time, the defendant lived in this kingdom separate and apart from the said Moise Busnach, as a single woman, to wit, at &c.; that the plaintiff did not give any credit to Moise Busnach, but contracted with the defendant as a femme sole and on her sole credit; and that the defendant made the said several contracts in the declaration mentioned, and each and every of them, as such femme sole as aforesaid: and this, &c. Rejoinder—that the said Moise Busnach, on the 1st May, 1825, and from thence until and upon the 1st July, 1825, lived

and resided with the defendant as his wife within the kingdom of England, to wit, at &c. Demurrer and joinder.

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Mr. Butt, in support of the demurrer.—There is nothing in this replication to shew the defendant's liability to be sued as a *femme sole*: for, it is consistent therewith that she was married here, and it does not appear that the husband either is in exile, or is an alien enemy or civilly dead, or intends permanently to reside in France. In *Marshall v. Rutton* (*a*), a *femme coverta* was held incapable of contracting or being sued as a *femme sole*, although living apart from her husband, and having a separate maintenance. In *Kay v. The Duchess De Pienne* (*b*), Lord Ellenborough said: "If the husband has never been in this kingdom, the wife of an alien I think may be sued as a *femme sole*. That is *The Duchess of Mazarine's* case (*c*). I do not know whether it was distinctly brought to Lord Kenyon's attention that the *Duc De Pienne* had been living with the defendant as his wife within the realm. If so, I cannot subscribe to his opinion" (*d*). "When the husband has abjured the realm, or is exiled, he cannot return, and the case stands upon perfectly different principles." In *Williamson v. Dawes* (*e*), it was held that a mere allegation of the fact of the temporary absconding of the husband was not sufficient to impose on the wife the liabilities of a *femme sole*. In that case and in *Ex parte Franks* (*f*), all the authorities upon the

(*a*) 8 Term Rep. 545.

(*b*) 3 Campb. 124.

(*c*) 1 Salk. 116, 2 Salk. 646.

There the husband was an alien enemy.

(*d*) Lord Kenyon had held, in *Walford v. The Duchess De Pienne*, 2 Esp. Rep. 554, that, where the husband of a married woman, a foreigner, went abroad, but de-

clared his intention of returning to this country in a short time, but did not do so, the wife was liable for debts contracted in his absence.

(*e*) Ante, Vol. 2, p. 352, 9 Bing. 292.

(*f*) Ante, Vol. 1, p. 1, 7 Bing. 762.

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subject are collected: and the result appears to be this, viz. that the wife is only liable to be sued as a *femme sole* where the husband is a foreigner who has never been in this country, an alien enemy, or is *civiliter mortuus*, that is, where he has been exiled or transported, or has abjured the realm.

Mr. Comyn, contra.—The replication contains a sufficient answer to the plea, shewing that the husband, at the time of the contracts, was living separate from his wife, and abroad. The replication is the same as that pleaded in *De Gaillon v. L'Aigle* (g), where it was held that the wife was not liable to be sued, though her husband resided abroad and she traded and obtained credit as a *femme sole*, unless she represented herself to be a *femme sole*. [Lord Chief Justice *Tindal*.—*Marshall v. Rutton* was decided after the case of *De Gaillon v. L'Aigle*, and has always been considered as a leading authority.—*Mr. Justice Gaselee*.—In *De Gaillon v. L'Aigle*, there was nothing to shew that the husband had ever been in this country.] Here, the rejoinder only shews that the defendant's husband cohabited with her in this country from the 1st of May till the 1st of July, 1825. His absence abroad from that time to the present is pretty strong evidence of his residence there being permanent; and there is nothing to shew that he has any intention to return.

PER CURIAM.—We think that the defendant is entitled to judgment upon this record. There should at least be something put upon the replication to shew that the absence of the husband is not temporary.

Mr. Curwood prayed leave to amend.

Granted, on payment of costs.

(g) 1 Bos. & Pull. 357.

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Monday,
June 9th.

Doe d. LAWFORD v. ROE.

ON the sixth day of this term Mr. *Williams* moved for judgment against the casual ejector. He admitted that the rule of Trinity Term, 32 Car. 2, in this Court, seemed adverse to the application, requiring the motion for judgment to be made, in Middlesex and London, in one week after the first days of Michaelmas and Easter Terms, and within the first four days of Hilary and Trinity Terms. But, he submitted, that, although the late rules made for the purpose of assimilating the practice of the Courts had, probably through inadvertence, overlooked this particular rule; yet that, inasmuch as the lessor of the plaintiff was thereby led into error, the Court might, in the exercise of their discretion, permit the strict rule to be departed from in this instance. [Lord Chief Justice *Tindal*.—Mr. Tidd thus states the rule (*a*): “In the King’s Bench, if the premises be situate in London or Middlesex, and the notice require the tenant to appear on the *first* day, or within the *first four* days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term; and then the tenant must appear in *four* days, or the plaintiff will be entitled to judgment. If, however, the motion be deferred until a later period of the term, the Court will order the tenant to appear in two or three days, and sometimes immediately, in order that the plaintiff may proceed to trial at the Sittings after term: but, if the motion be not made before the *last four* days of the term, the tenant need not appear until two days before the essoin day of the subsequent term: and in a town cause the motion cannot be made in a term subsequent to that in which the tenant had notice to appear. In the Common Pleas, it is a rule that the motion

The rule of this Court of Trinity, 32 Car. 2, requiring motions for judgment against the casual ejector, in Middlesex and London, to be made in one week after the first day of Michaelmas and Easter Terms, and within the first four days of Hilary and Trinity Terms, is still in force.

(*a*) *Tidd’s Pract.*, 9th edit., p. 1218.

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should be made, in town causes, within one week next after the first day of Michaelmas or Easter Term, and within four days next after the first day of Hilary or Trinity Term." There certainly is therefore a difference (and probably the only one) in the practice of the two Courts on the subject that has not been noticed in the late rules; and a difference that ought not to be.]

A rule nisi having been granted—

Mr. Watson now shewed cause.—Ignorance of the practice of the Court is the only reason assigned for the delay in making the motion. The affidavits in answer to the application shew this to be a case of peculiar hardship and vexation upon the tenant, the ejectment being brought for a supposed forfeiture incurred by reason of non-repair, and there being another action brought in the Court of King's Bench for the recovery of the same premises.

Mr. Williams was heard in support of his rule.

PER CURIAM.—An ejectment brought for a forfeiture is a sort of action in furtherance of which we should not feel disposed to violate any established rule. The tenant may have been lulled into a state of security by finding that no rule had been applied for within the time fixed by the practice of the Court. We think the rule must be discharged, but we do not think it a case in which the lessor of the plaintiff ought to be visited with costs.

Rule discharged, without costs.

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PICKFORD and Others v. DAVIS.

Monday,
June 9th.

THIS was an action of assumpsit for money had and received by the defendant to the use of the plaintiffs. At the trial before Mr. Baron Bolland at the Spring Assizes for Buckingham, in 1833, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:—

In Hilary Term, 1833, the plaintiffs, who were carriers, brought this action to recover back the sum of 3*l.* from the defendant, clerk to the trustees under an act of the 1 & 2 Geo. 4, c. lxxxv, passed the 28th May, 1821, intituled “An act for amending and more effectually repairing the highway between Hockliffe and Woburn in the county of Bedford, and for repairing the road leading through Woburn to Tickford Bridge in Newport Pagnell in the county of Buckingham,” as received by the said trustees to the plaintiffs’ use under the following circumstances:—

A van of the plaintiffs’, on four wheels, having the felloes of the wheels of less breadth or gauge than four inches and a half from side to side at the bottom or sole thereof, and drawn by four horses, on various days within three months next before the commencement of this action,

By the general turnpike act,
13 Geo. 3, c. 84,
the trustees of
turnpike roads
were empowered
to demand and
take for every
waggon having
the felloes of the
wheels of less
breadth or
gauge than six
inches, and for
the horses draw-
ing the same,
one half more
than the tolls
which should be
payable for the
same respec-
tively. By s. 7
of the 3 Geo.
4, c. 126, which
repealed the 13
Geo. 3, c. 84,
the trustees un-
der any local
act were em-
powered from
and after the
1st January,
1833, to take
for any waggon
having the fel-
lies of the
wheels of less
breadth than 4½ inches, or for the horses drawing the same, one half more than the tolls payable by such local act for any carriage having the wheels of the breadth of six inches. By the 4 Geo. 4, c. 95, s. 5, it is provided, “that, where the trustees of any road should not, previously to the passing of the 3 Geo. 4, c. 126, have taken and collected the additional tolls directed by the 13 Geo. 3, c. 84, and the local act should not have provided a scale of tolls applicable to the road, such trustees should, from the 1st January, 1834, continue to take and receive for every waggon having the felloes of the wheels of less breadth than 4½ inches, the same tolls as were by such local act payable in respect of such waggon;” and by s. 6, “that, where any local act should have a pre-
scribed rate of toll in respect of the breadth of the wheels of carriages and where the additional toll authorized to be taken by the 13 Geo. 3, c. 84, should not have been collected and imposed, the trustees should, after the 1st January, 1834, continue to collect the tolls prescribed in the local act, and should not collect the increased toll under the 7th section of the 3 Geo. 4, c. 126. By a local act, 1 & 2 Geo. 4, c. lxxxv, a scale of tolls was prescribed, by which a toll of 4*d.* was imposed for each horse drawing any waggon drawn by four horses, whether the felloes of the wheels were of the breadth of six inches and upwards or less. The trustees under this act had, previously to the passing of the 3 Geo. 4, c. 126, taken and collected the additional toll directed to be taken by the 13 Geo. 3, c. 84:—Held, that such increased toll (6*d.*) was properly demanded; the case not falling within the exemptions contained in the 5th and 6th sections of the 4 Geo. 4, c. 95.

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passed through a turnpike or toll-gate legally erected upon the road leading through Woburn to Tickford Bridge, being part of the road in the said act mentioned. On each of those days the toll-gate keeper, by direction of the trustees, demanded at the said gate the sum of $6\frac{1}{4}d.$ for each of the horses drawing the van, and refused to allow the van and horses to pass through the gate before the plaintiffs had paid the sum of $6\frac{1}{4}d.$ for each of the four horses, although the plaintiffs on the said occasions offered to pay the sum of $4\frac{1}{2}d.$ for each of the horses. The plaintiffs in consequence, under protest, paid the sum of $6\frac{1}{4}d.$ as a toll for passing through the gate; and the trustees thereby received the sum of $3l.$ more than they would have received if $4\frac{1}{2}d.$ only had been demanded and paid for each of the said horses.

Between the months of May and August, 1821, the toll actually demanded and received at each of the gates on the road under the same trust, leading through Woburn to Tickford Bridge, upon the plaintiffs' van, with the said wheels, drawn by four horses, was $4\frac{1}{2}d.$ for each of the horses drawing the same. Between August, 1821, and May, 1822, and previously to the passing of the 3 Geo. 4, c. 126, the trustees and commissioners of the said turnpike road demanded and received from the plaintiffs, at the same gates, in respect of the plaintiffs' van and horses, a toll of $6\frac{1}{4}d.$ for each of the horses drawing the same; and in and continually from August, 1822, to April, 1832, the trustees took and collected on the said road, in respect of the plaintiffs' van and horses, the same amount of toll as they had taken and collected between August, 1821, and May, 1822. Between April and August, 1832, the toll demanded and received at each of the gates on the plaintiffs' van drawn by four horses, was $4\frac{1}{2}d.$ for each horse drawing the same. From August, 1832, the toll demanded and received on the plaintiffs' van drawn by four horses, was $6\frac{1}{4}d.$ for each horse drawing the same.

By the general turnpike act, 13 Geo. 3, c. 84, s. 23 (1773), the trustees of turnpike roads are required "to demand and take for every waggon, wain, cart, or carriage having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least, at the bottom or sole thereof, and for the horses or beasts of draught drawing the same, one half more than the tolls or duties which are or shall be payable for the same respectively."

Under the before-mentioned local act of 1 & 2 Geo. 4, c. lxxv, the tolls to be taken on the road in question were—"for every horse or other beast drawing any waggon, wain, or such like carriage, having the fellies of the wheels of the breadth of six inches and upwards, and drawn by five or more horses or other beasts, the sum of 4*d.*; and drawn by four or any less number of horses or other beasts, the sum of 4*½d.* For every horse or other beast drawing any waggon, wain, or such like carriage, having the fellies of the wheels of less breadth than six inches, and drawn by four horses or other beasts, the sum of 4*½d.*; and drawn by three or any less number of horses or other beasts, the sum of 3*d.*"

By the general turnpike act of 3 Geo. 4, c. 126 (August 6th, 1822), all the then existing general turnpike acts were repealed: and by the 4th section, after reciting the great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout the kingdom, it was enacted, that, "from and after the 1st of January, 1823, all the provisions and enactments of this act shall be extended to all acts of parliament now in force, and to all acts that shall hereafter be passed for regulating, repairing, &c., turnpike roads." And by the 7th section power is given to the trustees of all local acts to take, after the 1st of January, 1823, for every waggon, wain, cart, or other such carriage, having the fellies of the wheels thereof of

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less breadth than four inches and a half at the bottom or sole thereof, or for the horse or horses or cattle drawing the same, one half more than the tolls which were payable by such local acts for any carriage of the same description having the wheels thereof of the breadth of six inches.

By the general turnpike act of 4 Geo. 4, c. 95 (July 19th, 1823), intituled "An act to explain and amend the 3 Geo. 4, c. 126," it was enacted (s. 5.), "that, where the trustees of any road should not, previously to the passing of the 3 Geo. 4, c. 126, have taken and collected the additional tolls directed by the 13 Geo. 3, c. 84, and the local act should not have provided a scale of tolls applicable to the road, such trustees should, from the 1st of January, 1824, continue to take and receive for every waggon and other such carriage having the fellies of the wheels of less breadth than four inches and a half, the same tolls as were by such local act payable in respect of such waggon and other such carriage." And by the 6th section of the same act it was enacted, "that, where any local act should have a prescribed rate of toll in respect of the breadth of the wheels of carriages, and where the additional toll authorised to be taken by the 13 Geo. 3, c. 84, should not have been collected and imposed, the trustees should, after the 1st of January, 1834, continue to collect the tolls prescribed in the local act, and should not collect the increased toll under the 7th section of the 3 Geo. 4, c. 126."

The plaintiffs contended that their vans were previously to the 1st of January, 1823, and had been ever since the 1st of January, 1824, subject only to the tolls imposed by the 1 & 2 Geo. 4, c. lxxxv, s. 2, and were not subject to the additional toll under the 3 Geo. 4, c. 126, s. 7.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover back the amount of the tolls they had been compelled to pay over and above the $4\frac{1}{2}d.$ upon each horse, imposed by the local act of 1 & 2 Geo. 4, c. lxxxv. If the Court should be of opinion that

the plaintiffs were so entitled, the verdict was to stand ; but, if otherwise, a nonsuit was to be entered.

The case was argued in Hilary Term last.

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Mr. Serjeant *Wilde*, for the plaintiffs.—The 1 & 2 Geo. 4, c. 85, which received the royal assent on the 28th of May, 1821, repealed all the previous local acts relating to the road in question, and imposed new tolls in lieu of those that were before taken. The 18th section contains a scale of tolls, by which there is imposed a toll of $4\frac{1}{2}d.$ upon every horse drawing any waggon, &c., where such waggon is drawn by four horses, whether the fellies of the wheels are of a greater or less breadth than six inches. The question is whether the new tolls imposed by this act have not superseded the tolls payable under the previously existing local act and the general turnpike act, 13 Geo. 3, c. 84. In *Ridge v. Garlick* (*a*), it was expressly decided, that, where a subsequent local act provided for a specific toll proportioned to the breadth of the wheels, the 23rd section of the 13 Geo. 3, c. 84 (which empowered the trustees of turnpike roads to demand and take for every waggon, &c., having the fellies of the wheels of less breadth or gauge than six inches from side to side at the least at the bottom or sole thereof, and for the horses or beasts of draught drawing the same, one half more than the tolls or duties which were or should be payable for the same respectively), had no operation. By the 7th section of the general turnpike act of the 3 Geo. 4, c. 126, which repealed all the then existing general turnpike acts, power was given to the trustees of all local acts to take, after the 1st January, 1823, for every waggon, &c., having the fellies of the wheels thereof of less breadth than four inches and a half at the bottom or sole thereof, or for the horse or horses drawing the same, one half more

(a) 2 J. B. Moore, 481, 8 Taunt. 424.

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than the tolls which were payable by such local act for any carriage of the same description having the wheels thereof of the breadth of six inches. By the 4 Geo. 4, c. 95, the original toll was in certain cases restored. The 5th section of that act enacts "that, where the trustees of any road should not, previously to the passing of the 3 Geo. 4, c. 126, have taken and collected the additional tolls directed by the 13 Geo. 3, and the local act should not have provided a scale of tolls applicable to the road, such trustees should, from the 1st January, 1824, continue to take and receive for every waggon and other such carriage having the fellies of the wheels of less breadth than four inches and a half, the same tolls as were by such local act payable in respect of such waggon and other such carriage;" and the 6th section, "that, where any local act should have a prescribed rate of toll in respect of the breadth of the wheels of carriages, and where the additional toll authorized to be taken by the 13 Geo. 3, c. 84, should not have been collected and imposed, the trustees should after the 1st January, 1824, continue to collect the tolls prescribed in the local act, and should not collect the increased toll under the 7th section of the 3 Geo. 4, c. 126."

Such being the state of the law with regard to turnpike roads, it appears from the case that the tolls actually received on the road in question from the plaintiffs, were as follow:—From May to August, 1821, 4½d. per horse, according to the provisions of the 1 & 2 Geo. 4, c. 85; from thence down to August, 1822, the larger toll of 6½d.; from August, 1822 (when the 3 Geo. 4, c. 126 passed) down to April, 1832, the same toll of 6½d.; in April, 1832, the plaintiffs refused to pay the additional toll, and accordingly from that time to the month of August following the lesser toll of 4½d. was taken. In August, 1832, a new lessee taking the tolls demanded and received the higher toll. Upon a reference to all the statutory provisions, it is clear, that, although the toll of 6½d. for each horse was properly

demanded from the time of the passing of the 3 Geo. 4. c. 126, yet, from the 4 Geo. 4, c. 95, the smaller toll of 4½d. alone was payable.

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Mr. Serjeant *Storks*, for the defendant.—The policy of the act of the 13 Geo. 3, c. 84, was, as was said by Lord Chief Justice Gibbs in the case of *Ridge v. Garlick*, “that, inasmuch as roads had suffered a material injury by the passage of carriages having narrow wheels, such carriages should pay a larger toll than those which had broad; and, as that had not been sufficiently provided for by the local acts, by the 23d section of that statute the toll was to be increased one half if waggons, carts, or other carriages travelled with wheels under six inches in breadth.” This case does not fall within the 6th section of the 4 Geo. 4, c. 95, the additional toll imposed by the 13 Geo. 3, c. 84, having actually been collected, and both the conditions therein not being complied with; nor does it fall within the 5th section, because a scale of tolls was provided by the local act. The words of the act imposing the toll being clear and unambiguous, and the exemption confused and unintelligible, the larger toll was properly demanded.

Mr. Serjeant *Wilde*, in reply.—It is a general and universal principle of law, that no burthen shall be held to be imposed upon the subject, unless the intention of the legislature to create the imposition be perfectly clear and free from doubt. The 5th section of the 4 Geo. 4, c. 95 refers to a case where the local act has provided no scale of tolls, and where the increased tolls under the 13 Geo. 3, c. 84, might have been collected and were not: the 6th section refers to a case where the local act has a scale of tolls varying with the width of the wheels, and where the increased toll has not *legally* been collected; for, it is diffi-

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cult to suppose that the legislature intended to ingraft a right upon an extortion.

Cur. ad. null.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question which has been raised upon this special case is this, whether the defendant was entitled to claim the larger toll of $6\frac{3}{4}d.$, or the smaller toll of $4\frac{1}{4}d.$, for each horse drawing the plaintiffs' van, such van having the fellies of the wheels of less breadth than four inches and a half. The toll sought to be recovered back had been taken at the end of the year 1832; and the right of the plaintiffs to recover appears to us to depend upon the inquiry, first, whether the general turnpike act, 3 Geo. 4, c. 126, s. 7, made any and what addition to the tolls imposed by the local act which governs this particular road; secondly, if such addition has been made, whether it is in any way altered or affected by the subsequent general turnpike act, 4 Geo. 4, c. 95.

The local act which governed this highway at the time the tolls were taken, was, the 1 & 2 Geo. 4, c. lxxv, an act which received the royal assent on the 28th of May, 1821, and which came into operation from that day. This act repeals the local acts therein enumerated; and, in section 18, sets out a scale of tolls to be taken from the time of passing that act. By this scale it is enacted that there shall be taken for every horse drawing any waggon having the fellies of the wheels of the breadth of six inches and upwards, and drawn by four or any less number of horses, the sum of $4\frac{1}{4}d.$; and for every horse drawing any waggon having the fellies of the wheels of less breadth than six inches, and drawn by four horses, the sum of 4d. Under this scale, therefore, it is obvious, that, unless it is affected by some of the provisions contained in any former

or any subsequent general turnpike act, the tolls to be taken, from the month of May, 1821, down to the present time, for every horse drawing the plaintiffs' van, under the circumstances stated in the case, would have been $4\frac{1}{2}d.$, and no more; the same amount of toll appearing to be imposed, where the waggon is drawn by four horses only, whether the fellies of the wheels are of the breadth of six inches and upwards, or of less breadth than six inches. It appears accordingly, that, from the passing of this act, that is, from May, 1821, the toll of $4\frac{1}{2}d.$ per horse and no more was for some time the toll demanded and taken from the plaintiffs in respect of their van above described. But, in the month of August, 1821, the trustees of the road demanded and took the larger toll of $6\frac{1}{4}d.$ per horse, insisting, as it would seem, upon the application of the provision contained in the general turnpike act then in force, viz. the 13 Geo. 3, c. 84, s. 23, to the present case; under which, where the fellies of the wheels were of less breadth than six inches from side to side, the trustees were directed to take one half more than the tolls or duties which should be payable under any local act: and this increased toll continued to be taken from August, 1821, without any alteration, down to the passing of the general turnpike act, 3 Geo. 4, c. 126, which received the royal assent on the 6th August, 1822; and, indeed, from thence until April, 1832. But this clause of the general turnpike act, 13 Geo. 3, c. 84, was determined by the Court of Common Pleas, in the case of *Ridge v. Garlick* (a), not to apply to tolls imposed by local acts which contained a specific enactment of toll in respect of a particular description of wheel; in which cases it was held that the particular provision of a specific toll proportioned to the width of the wheels took the case out of the operation of the general turnpike act, by shewing what the legislature intended in

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the particular case. We think it clear, therefore, that this increased toll, so long as it depended on the authority of the 13 Geo. 3, c. 84, was an illegal toll, being grounded on a misapplication of the provisions of that act.

This brings us to the question whether the increased toll of 6½d. per horse, which was illegal under the powers of the former general act, became legal under the powers of the new general turnpike act, 3 Geo. 4, c. 126, which came into operation on the 1st January, 1823. And we think the latter act had the effect of authorizing such increased toll to be taken. By that act, the old general turnpike act, 13 Geo. 3, c. 84, is repealed, and by section 7 the trustees under any local act then made or thereafter to be made, were empowered, from and after the 1st January, 1823, to take for every waggon having the fellies of the wheels of less breadth than four inches and a half, or for the horses drawing the same, one half more than the tolls payable by such local act for any carriage, &c., having the wheels of the breadth of six inches. That clause differs from the provision contained in the 13 Geo. 3, c. 84, in this important respect, that, whereas the old act contained no reference whatever to tolls payable under local acts, proportioned to the width of the wheels, but professed to legislate only for the case where a toll was imposed generally on the horse or the carriage, the new act, on the contrary, applies itself distinctly and in terms to the case of local acts containing a scale of tolls proportioned to the width of the wheels being above or below six inches. To such cases it creates and applies a new scale of increase, viz. a scale where the wheels are less than four inches and a half, or more than four inches and a half and less than six. Now, the precise provision contained in the local act under which this road is governed is a scale where the wheels are of a width above or below six inches. And we can see no principle of construction upon which it can be held that the scale of increased tolls created by the new general

turnpike act should not be held to apply to the scale given by this local act. We therefore think the increased toll of $6\frac{1}{4}d.$ became the legal toll upon each of the horses in question from the 1st January, 1823; and that, at all events, it continued to be the legal toll until the passing of the subsequent general act, 4 Geo. 4, c. 95: and the only remaining question appears to be, whether such subsequent act has made any alteration in this respect. The only sections of that act which appear to have any bearing on the question are the 5th and 6th. The 5th section relates to one class of cases only, viz. where the commissioners *shall not*, previously to the passing of the former act, that is previously to the 6th August, 1822, have taken the additional tolls on waggons having the wheels of less breadth than six inches from side to side, directed to be taken by the 13 Geo. 3, c. 84, and the particular or local act *shall not* have provided a scale of tolls applicable to the road. In that case, the commissioners are directed after the 1st January, 1824, to continue to take for every waggon having the fellies of the wheels of less breadth than four inches and a half, the same tolls as are by the local act payable in respect of such waggon. This section, however, cannot apply to the present case, as neither of the conditions specified therein are found to exist here; for, the special case finds that the commissioners *did take* previously to the 6th August, 1822, the additional tolls directed to be taken by the 13 Geo. 3, c. 84; and, again, the local act *has* provided a scale of tolls applicable to the particular road. The 6th section directs, that, where any particular act of parliament then in force shall direct a higher or lower rate of toll to be collected, regulated in respect of the greater or lesser breadth of the wheels, and where, in addition to the tolls received under the particular act, the additional tolls in respect of the breadth of wheels authorized to be taken by the act 13 Geo. 34, c. 8, shall *not* have been collected and imposed, the commissioners shall, after the 1st Janu-

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ary, 1824, continue to take the tolls under the powers of the local act, and shall not impose the additional tolls authorised to be levied by the act therein recited, 3 Geo 4, c. 126. And we think the present case does not fall within this section, because, although one of the conditions mentioned therein, viz. that the particular act directs a higher or lower rate of toll to be taken, is found to exist, yet the second condition, that the additional toll authorized by the 13 Geo. 3, c. 84, had not been collected and imposed, is denied by the special case: for, we cannot give any other sense to the words "collected and imposed" than their ordinary and natural meaning, that is, taken under the real or supposed authority of that statute.

The present case, therefore, appearing to us to be a *third* case, differing from both those intended to be remedied by the 5th and 6th sections, viz. a case in which the local act *does* direct a higher or lower rate of tolls to be taken in respect of the greater or lesser breadth of the wheels, and in which the additional toll authorized by the 13 Geo. 3, c. 84, has been collected and imposed; we think therefore it is left untouched by the last general turnpike act; and consequently that the increased toll of $6\frac{1}{4}d.$ is the legal toll. We therefore think there must be judgment for the defendant.

Judgment for the defendant.

Mr. Serjeant *Wilde* moved for and obtained leave, on the part of the plaintiffs, to turn the case into a special verdict, in pursuance of an agreement entered into at the trial.

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*Monday,
June 9th.*

TRIMBEY v. VIGNIER.

THIS action was brought on the 7th February, 1833, by the plaintiff, who is an Englishman resident in London, as the holder, against the defendant as the maker, of the two following promissory notes:—

“ A la fin Decembre prochain je payerai à l'ordre de M. Burillon la somme de six cents dix francs, valeur en marchandise.

B. P. f. 610.

“ Paris, le 10 Juillet, 1829.

“ E. VIGNIER.

“ Rue St. Denis, 193.”

Indorsed—“ Payez à M. Durant, valeur en compte. Paris le 30 Juillet, 1829.

“ P. BURILLON.”

“ Je garantie à M. Durant le protet et la denonciation du present billet comme s'il avoit été fait le dispensant de ces formalités.

“ Paris, le deux Janvier, 1830.

“ P. BURILLON,

“ P. DURANT.”

“ Au quinze Decembre prochain je payerai à l'ordre de M. Burillon la somme de trois cents francs, valeur en marchandise.

“ Paris, le 10 Juillet, 1829.

B. P. f. 300.

“ E. VIGNIER,

“ Rue St. Denis, No. 193.”

Indorsed—“ Payez à M. Durant, valeur en compte. Paris, le 10 Juillet, 1829.

“ P. BURILLON.”

“ Je garantie à M. Durant le protet et la denonciation du present billet comme s'il avoit été fait le dispensant de ces formalités.

“ Paris, le 16 Decembre.

“ P. BURILLON,

“ P. DURANT.”

Upon the trial before Mr. Justice Bosanquet, at Guild-

action could be maintained by him in our Courts.

The rule applicable to contracts made in one country and put in suit in the Courts of law of another, is this: —the interpretation of the contract must be governed by the law of the country where the contract was made, and the mode of suing, and the time within which the action must be brought, by the law of the country in which it is sought to be enforced.

Therefore, where a promissory note was made by the defendant in France, and indorsed in blank by the payee in that country, the maker and payee both at the times of making and indorsing the note being domiciled there:— Held, that, as no action could have been maintained upon the note in the French Courts of law, in the name of the indorsee, the indorsement according to the law of France operating as a procuration only, and not as a transfer, so no

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hall, at the second Sitting in Easter Term last, the plaintiff produced the above notes (which were on unstamped paper), and proved the handwriting of the respective parties to the notes, and their value in English currency. The defendant then called a witness who stated himself to be an "Avocat;" that he had practised as such upwards of twenty years, and was then attached in that capacity to the French Consulate in London; that he was conversant with the laws of France; and that by the law of France a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were protested; that the indorsement to the plaintiff, being in blank, and not according to the formalities required by the Code de Commerce, Articles 136, 137, 138, was invalid, and passed no interest to the holder (a). In support of this statement, various articles in the Code de Commerce above referred to were read and translated to the jury. It was also proved, that, *at the time the action was brought, the defendant was domiciled and carried on business in London*; but, at the time when the notes respectively were drawn and fell due, the maker and indorsees thereof were all resident in France and French subjects. The counsel for the plaintiff produced and read an extract from the Code de Commerce.

The jury found, in reply to the inquiries of the learned Judge, that the defendant was living in France at the time the notes were drawn and when they fell due; that Durant, the indorsee, was also a resident in Paris at the same time; that, according to the laws of France, the indorsement was invalid; and that a protest was necessary.

(a) Article 136—"Le propriétaire d'une lettre de change se transmet par la voie de l'endossement."

Article 137—L'endossement est daté. Il exprime la valeur fournie. Il énonce le nom de celui

à l'ordre de qui il est passé."

Article 138—"Si l'endossement n'est pas conforme aux dispositions de l'article précédent, il n'opère pas le transport; il n'est qu'une procuration."

On this finding the learned Judge directed a verdict to be entered for the defendant, reserving all questions of law; and such verdict was accordingly entered, and leave given to the plaintiff's counsel to move the Court to enter a verdict for the plaintiff on the points reserved.

Subsequently to the verdict, by leave of the Court, it has been given in evidence that the plaintiff was in England when he received the bills.

In the following term, the plaintiff moved to set aside the verdict, upon the grounds—first, that, admitting the law of France to be as stated, it could not govern the rights of parties resident here, the requisitions of the Code relied upon by the defendant being merely municipal regulations—secondly, that the law of France was misrepresented by the defendant's witness. The Court thereupon granted a rule to shew cause why the verdict should not be entered for the plaintiff, or why there should not be a new trial, or why there should not be a new trial on payment of costs. The Court directing, that, before cause was shewn, the opinions of French advocates should be obtained, shew to what the law of France is upon the points at issue; which has been done. Upon the rule coming on for argument, the Court wished the circumstances to be set forth in a special case.

An opinion has been obtained by the plaintiff (*b*): and,

(*b*) The opinion procured by the plaintiff, as far as it related to the indorsement in blank, was as follows:—

"This circumstance was no obstacle to Mr. Trimbley's right of action; for, the 138th article of the Code de Commerce thus expressed—' If the indorsement is not conformable to the requisition of the preceding article, it does not operate as a transfer of inter-

est, but only as a procuration'—is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. If, however, the holder under an indorsement in blank does not proceed against the party immediately indorsing to him, but against the maker of the note, or against the parties who have made regular indorsements, neither the maker

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to negative the necessity of a protest as between the holder and the maker, the plaintiff refers to the Code de Commerce, articles 164 and 168.

The various authorities of the French law which are relied upon in favour of the defendant, are to be found in the Code de Commerce, viz., as to the indorsement, articles 110 and 136 to 139—and as to the necessity of protest, articles 163, 172, 173, 174, 175, 187, 188. An opinion of a French advocate had also been obtained for the defendant prior to the period when the rule nisi came on for argument (c).

The questions for the opinion of the Court were—first, If the correct construction of the terms of the Code de Commerce which apply to the circumstances in this action be such as would prevent the plaintiff from enforcing payment against the defendant in the Courts of France, will the law of France govern the rights of the parties under the circumstances of this case?—Secondly, if the decision of this case is to depend upon the terms of the Code de Commerce, then the Court is to say how far the articles of the Code relied upon by the defendant apply to the circumstances of this case, and whether a correct construction has been put upon such articles by the evidence and opinion produced by the respective parties. If the Court should

nor such parties can avail themselves of the provision of the 138th article of the code. Upon this point the jury has been completely led into error. . . . “Blanchet.”

“Paris, 21 May, 1833.”

(c) The opinion procured by the defendant upon the same point was as follows:—

“There is no doubt, that, according to the French law, an indorsement in blank is insufficient to transmit regularly the property

in a bill of exchange or promissory note. The Code de Commerce is precise on this point. Article 137 says—‘The indorsement is dated: it expresses the value given for it, and states the name of him to whose order it is passed.’ The article 138 adds—‘If the indorsement is not conformable to the preceding article, it does not operate as a transfer; it is only a procuration.’ “Vervoort.”

“Paris, 21 Oct. 1833.”

be of opinion, that, under the circumstances, the plaintiff ought to have recovered, then a verdict to be entered for him; if not, the verdict for the defendant to stand.

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Mr. Serjeant Taddy, for the plaintiff.—Assuming that the plaintiff would be precluded from suing in the French Courts upon the notes in question, by reason of the indorsement not being made in conformity with the 137th article of the Code de Commerce, the question is whether a mere irregularity of that description is in an English Court of law to be permitted to intercept the justice of the case. In the construction of contracts regard must be had to the law of the country in which the contracting parties resided at the time of the contract; but the mode of enforcing them must be regulated by the law of the country in which the action is brought. Huberus lays down the rule thus (*d*)—"Receptum est optimâ ratione, ut in ordinantis judiciis loci consuetudo ubi agitur, etsi de negotio alibi celebrato spectetur, ut docet Sandius, lib. 1, tit. 12, def. 5, ubi tradit etiam in executione sententiae alibi latè servari jus loci in quo fit executio, non ubi res judicata est." In *Williams v. Jones* (*e*) it was held, that, though the cause of action accrued within the jurisdiction of the Supreme Court at Calcutta while both the parties were resident there, and by the king's charter granted in pursuance of the statute 13 Geo. 3, c. 63, that Court is authorized to exercise the same jurisdiction in civil cases as is exercised by the Court of King's Bench within England by the common law thereof, and assuming that by such authority the provisions of the 21 Jac. 1, c. 16, s. 7, and 4 Anne, c. 16, s. 19, are transferred to India as part of the law of England auxiliary to the common law; yet, by the express terms of the savings in those statutes as applicable to the

(*d*) *Huberi Prælectiones Civilis Juris*, tit. 3, De Conflictū Legum, s. 7.

(*e*) 13 East, 439.

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Courts here, the plaintiff's right of action upon an assumption is saved, if he (having returned home before the defendant,) commence such action within six years after the defendant's return home, though more than six years had elapsed in India after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the Court in that country. In *Melan v. The Duke de Fitzjames* (*f*), the defendant had been held to bail in this country on an instrument entered into in France, by which instrument his property only and not his person was according to the law of France made liable, and the Court on motion discharged him on his entering a common appearance. But in that case Mr. Justice Heath, who differed from the other two Judges, said: "In construing contracts, we must be governed by the laws of the country in which they are made; for, all contracts have a reference to such laws. But, when we come to remedies, it is another thing: they must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it." In *The British Linen Company v. Drummond* (*g*), where an action was brought in this country on a cause of action accruing in Scotland, it was held that the contract could not be enforced here after the statute of limitations had attached, although the limitation by the law of Scotland was forty years. So, in *De La Vega v. Vianna* (*h*), it was held, that, in a suit between parties resident in England on a contract made between them in a foreign country, the contract is to be interpreted according to the foreign law, but the remedy must be taken according to the law here. Lord Tenterden, in delivering the judgment of the Court, said: "We think that the distinc-

(*f*) 1 Bos. & Pul. 138. (*g*) 10 Barn. & Cress. 903.(*h*) 1 Barn. & Adolph. 284.

tion laid down by Mr. Justice Heath (*f*) ought to prevail. A person suing in this country must take the law as he finds it: he cannot, by virtue of any regulation in his own country, enjoy greater advantages than the suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to." Here, the objection is *ad modum et tempus actionis instituendæ*, and not *ad valorem contrattū*. The case of *Wynne v. Jackson* (*g*) is an authority to the same effect. In *Shaw v. Harvey* (*h*) it was held that persons trading a broad insucha mode as to constitute a partnership here, may sue here as partners for consignments sent to this country, though they cannot sue at the place of trading by reason of the particular law of that country. "These," says Lord Tenterden, "are merely municipal regulations, preventing, as it seems, their suing as partners where they are in force, but not affecting the general rights of the parties." So, in *Robinson v. Bland* (*i*), it was held that the place of making a contract should be considered in expounding it, unless the parties have a view to another kingdom. Here, the plaintiff was in this country when he received the bills, and consequently he received them for the purpose of dealing with them according to the laws of this country. The indorsement is sufficient to enable the holder to recover in the English Courts; and there is nothing in the nature of the contract to render it local.

Paillet, in his *Manuel de Droit Francais* (*k*), in commenting upon the 138th article of the *Code de Commerce*, says: "L'accepteur ne peut se refuser au paiement d'une lettre de change sous le prétexte que l'ordre est en blanc."

(*f*) In *Melon v. The Duke de Fitzjames*. (*i*) 1 Sir W. Blac. 234, 256, 2 Burr. 1077.

(*g*) 2 Russell, 351.

(*k*) Page 1225, ss. 6, 8.

(*h*) Moody & Malkin, 526.

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Les endosseurs et leur créanciers sont les suels qui puissent faire valoir ce moyen." And again—"L'endossement en blanc peut valoir autrement que comme procuration. Il peut valoir comme titre propre et personnel au porteur s'il est constant que l'effet endossé en blanc fut remis au porteur avec l'intention de la saisir du titre; par exemple, pour lui servir de garantie des valeurs qu'il auroit fournies au souscripteur de l'effet."

Mr. Serjeant *Stephen*, contra.—There are two questions to be considered in the present case—first, whether the law of France or that of this country is to govern the plaintiff's right to sue—secondly, what the law of France upon this subject in fact is.

Whether there be an existing contract between the parties or not, depends upon the law of the country in which the contract is supposed to be made—*Lacon v. Higgins* (*l*), *Dalrymple v. Dalrymple* (*m*). So, for the construction of the contract, and the right to sue thereon, resort must be had to the country where it is made—*Talleyrand v. Boulanger* (*n*), *Burrows v. Jemino* (*o*), *Ballantine v. Golding* (*p*), *Solomons v. Ross* (*q*), *Potter v. Brown* (*r*), *Clegg v. Levy* (*s*). It is clear from these authorities that all actions upon contracts must be put in force according to the law of that country in which the contract was made, and which the contracting parties must have had in their contemplation at the time of entering into the contract. In *Tenon v. Mars* (*t*), an affidavit of debt, stating that the defendant was indebted to the plaintiff "as liquidator of an estate duly appointed by the law of

(*l*) 1 Dow. & Ryl. N. P. C. 38.

(*m*) 2 Hagg. Rep. 59.

(*n*) 3 Vesey, 447.

(*o*) 2 Strange, 733.

(*p*) Cited in *Smith v. Buchanan*,
1 East, 10.

(*q*) Cited in *Folliott v. Ogden*,

1 Hen. Blac. 131.

(*r*) 5 East, 124.

(*s*) 3 Campb. 166.

(*t*) 3 Man. & Ryl. 38, 8 Barn.
& Cress. 638.

France," was held defective, for not shewing that the plaintiff as liquidator was by the law of France entitled to sue. In *Shaw v. Harvey*, the contract was made in this country: and in the case of *The British Linen Company v. Drummond* the question arose on the statute of limitations; the time and manner of suing are quite distinct from the construction of the contract.

Then, as to what is the law of France upon the subject: Here the indorsement omits the name of the payee, the date of the indorsement, and the consideration for which it is made. Upon this point the Code de Commerce (articles 136, 137, 138) is most clear and explicit (*u*). The plaintiff would therefore be precluded from suing upon the note in the French Courts: the action must have been brought in the name of Durant, the indorser; and if the plaintiff be permitted to recover in this country, there is nothing to prevent Durant from suing again in France. By the laws of every European state except England, an indorsement in blank is prohibited.

Mr. Serjeant Taddy was heard in reply.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the opinion of the Court:—

The point that has been reserved for our consideration in this case is, whether the plaintiff, under the circumstances stated in the special case, is entitled to maintain this action in an English Court of law in his own name; for, as to the several other objections that have been raised, the view which we have taken of the question above adverted to renders it unnecessary for us to give any opinion upon them.

(*u*) And see Pothier, Vol. 4, p. 22, 2 edit. Dupin. 1827.

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The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country, each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry therefore is, whether this action could have been maintained by the plaintiff against the defendant in the Courts of law in France. Upon this point of French law, the opinions of the foreign advocates which have been taken, by consent, since the trial of the cause, appear to be contradictory; but, as each of them finds his opinion on the Code de Commerce, Articles, 136, 137, and 138, we feel ourselves at liberty to refer to the text of that code, in order to form our own judgment on the point: and, upon reference thereto, we think the language of the code is clear and express, that an indorsement in blank, that is, without containing the date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note; it is but a procuration. And, the language of the code being general, and unrestricted by any expressions which confine its operation to questions between the indorsee and the indorser of the note, we think, that, if an action had been brought in any of the Courts of law in France against the maker of the note, it would have been held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last indorser, by procuration. The question therefore becomes this—supposing such rule to prevail in the French Courts by the law of that country, is the same rule to be adopted by the English Courts of law when the action is brought here—the law of England applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder? The rule that applies to the case of contracts made in one country and put in suit in the Courts of law of an other country, appears to be this; that the interpretation of the contract must be governed

by the law of the country where the contract was made—*lex loci contractus*: the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought—in ordinandis judiciis, *loci consuetudo ubi agitur* (*x*). This distinction has been clearly laid down and adopted in the late case of *De La Vega v. Vianna* (*y*).

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The question therefore is, whether the law in France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case, it must be adopted by our Courts; in the latter, it may be altogether disregarded, and the suit commenced in the name of the present plaintiff. And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences that would follow if the plaintiff sues in his own name, or is compelled to use the name of the former indorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and, with reference to those consequences, we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

We therefore think that our Courts of law must take notice that the plaintiff could have no right to sue in his

(*x*) See Huberi *Prælectiones Civilis Juris*, tit. 3—*De Confictu Legum*, sect. 7.

(*y*) 1 Barn. & Adolph. 284. See also the case of *The British*

Linen Company v. Drummond, 10 Barn. & Cress. 903, where the different authorities are brought together.

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own name upon these contracts in the Courts of the country where such contracts were made; and that, such being the case there, we must hold in our Courts that he can have no right of suing here.

Judgment for the defendant.

*Tuesday,
 June 10th.*

In an action on the case on the statute 11 Geo. 2, c. 19, for an irregular distress, the declaration stated that the rent in respect of which the distress was made was due under a demise from A. and B.; the proof was of a demise by T.:—Held, a fatal variance, this allegation being of the foundation of the action.

IRELAND v. JOHNSTON, VAUGHAN, PROCTER, and FOWLER.

THIS was an action on the case for an irregular and excessive distress. The second count of the declaration stated that the defendants seized and distrained certain goods and chattels of the plaintiff &c. &c. then found and being in and upon certain premises with the appurtenances of the plaintiff, as, for, and in the name of a distress for certain arrears of rent due to the defendants Johnston and Vaughan for and in respect of the said premises, upon a certain demise of the said premises: yet the defendants, disregarding the statute in such case made and provided, and contriving and fraudulently intending to injure the plaintiff in that behalf, did not nor would cause the said goods and chattels so distrained as aforesaid to be appraised by two sworn appraisers, according to the form of the statute in such case made and provided, previously to the sale of the said goods and chattels: but, on the contrary thereof, the defendants afterwards and before the said goods and chattels had been appraised by two sworn appraisers, according to the form of the statute in that case made and provided, to wit, on &c., in &c., wrongfully sold the said goods and chattels without having had the same previously appraised by two sworn appraisers, contrary to the form of the statute in that case made and provided.

The defendants pleaded severally not guilty: upon which issues were joined.

The cause was tried before Mr. Justice Vaughan, at the Sittings at Westminster after the last term, when the following facts appeared in evidence:—Mr. Farquhar, of the firm of Johnston & Farquhar, was employed as solicitor for one Mrs. Thom, the committee of the person and estate of one Benjamin Burd, a lunatic; and, as agents for Mrs. Thom, on the 27th of September, 1832, entered into an agreement with the plaintiff to let to him as a quarterly tenant a house in Windmill-Street, Lambeth, at the rent of 5*l.* 10*s.* per quarter. The defendant entered into possession of the premises under this agreement, and remained so in possession till the month of April, 1833, when, two quarters' rent being in arrear, Farquhar, by the following document (which was actually written by Farquhar, and signed by him in the name of the firm), gave to the defendant Fowler authority to distrain for the same:—

“ Mr. L. W. Fowler,

“ I do hereby authorise and empower you to levy a distress on the goods and chattels of Mr. Hugh Ireland, of No. 9, Windmill Street, in the parish of St. Mary, Lambeth, in the county of Surrey, for the sum of 11*l.*, being the two last quarters' arrears of rent due to *me* the 25th day of March last: and for your so doing this shall be a sufficient authority to indemnify you against all actions at law, expenses, &c., which may occur through this levy. As witness *my* hand this 6th day of April, 1833.

(Signed) “ Johnston & Farquhar, } landlord.”

“ Agents for the Committee of the }

In supposed pursuance of the above authority, the plaintiff's goods were seized, not by Fowler in person, but by the defendant Procter in the name of Fowler, and the notice and inventory were signed by Fowler. The notice stated the distress to have been made “ by the authority of the agents, Mr. Johnston and Vaughan.” On the 11th of April, the goods seized were appraised by

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two sworn appraisers, of whom the defendant Procter was one, and were sold on the same day.

On the part of the plaintiff it was contended that the appraisalment was illegal, the statute 2 William & Mary, sess. 1, c. 5, s. 2(a), and the law and practice thereon, requiring that the appraisers shall be persons unconnected with the making of the distress. A verdict having been found for the plaintiff on the second count—

Mr. Serjeant *Spankie*, for the defendants Vaughan, Procter, and Fowler, and Mr. *Kelly*, for Johnson, on a former day in this term, in pursuance of leave reserved at the trial, obtained rules nisi to enter a nonsuit or a verdict for the defendants, on the following grounds—first, that there was a variance between the declaration and the evidence offered in support of it; the declaration charging

(a) By which it is enacted, "that, where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house or other most notorious place on the premises charged with the rent distrained for, replevy the same with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the persons distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place

where such distress shall be taken (who are thereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers, whom such sheriff, under-sheriff, or constable are thereby empowered to swear to appraise the same truly, according to the best of their understandings; and, after such appraisalment, shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels should be distrained, and of the charges of such distress, appraisalment, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use.

the defendants with having seized the goods in question "as, for, and in the name of a distress for certain arrears of rent due to *Johnston and Vaughan* for and in respect of the premises, upon a demise of the said premises," and the evidence shewing that the demise under which the plaintiff held was made by Mrs. Thom, the committee of Burd, the lunatic: this it was submitted was a material and fatal variance, inasmuch as the demise was the very foundation of the action, for, if there were no demise, the plaintiff's remedy would have been in trespass, instead of an action on the statute—secondly, that there was nothing in the statute to disqualify Procter to act as one of the appraisers, by reason of his having held possession of the distress for Fowler—thirdly, that Johnston at all events was not liable, he neither being the party who actually gave the authority to distrain, nor the party for whose benefit the alleged illegal act was done; and that, although the landlord and the persons guilty of the irregularity might be responsible, the intermediate parties were not, unless shewn to have done something contributory to the act complained of. Upon this point *Stone v. Cartwright* (a) was relied on as an express authority. It was there held that no action lies against an agent for damage done by the negligence of those employed by him in the service of his principal; for, the principal, or those actually employed, only are liable.

Mr. Serjeant *Wilde* now shewed cause.—The complaint alleged in the count assumes the distress to have been rightfully taken, but charges a failure to obey the requisitions of the statute in the mode of disposing of it. The cause of action in no way depended on the title of the landlord, and therefore it was not necessary strictly to prove that part of the count which stated the plaintiff to

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have held under a demise from Johnston and Vaughan. To entitle the plaintiff to maintain the action, it was enough to shew that the defendants were professing to act under the statute. A variance in that which is mere matter of inducement to the statement of the act complained of, is not fatal. In *Frith v. Gray* (*b*), a declaration on an agreement alleged Barnet Common to be in Middlesex, instead of in Hertfordshire, and this was held to be surplusage, it being immaterial in such an action in which county the common lay. In *Purcell v. Macnamara* (*c*), in an action on the case for a malicious prosecution, it was held not to be material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought; and therefore that a variance in that respect between the day laid and the day stated in the record which was produced to prove the acquittal, was not material. In *Phillips v. Shaw* (*d*), in assumpsit for not indemnifying the plaintiff in consequence of his having become bail for A. in an action at the suit of B., it was stated that B. recovered against the plaintiff in Michaelmas Term; the judgment given in evidence was in Hilary Term: and it was held that this was no variance, inasmuch as this was not matter of description, but in substance an allegation that the judgment had been obtained before the commencement of the action. In *Burbige v. Jakes* (*e*) it was held that evidence of a house situate in the parish of M. will support an averment of a house "at S.," S. being extra-parochial, and both places usually going by the name of M. In *Draper v. Garrett* (*f*), in case against the sheriff for taking insufficient pledges in a replevin bond, the declaration set out the record, and averred under a videlicet that the plaint in the county court was

(*b*) 4 Term Rep. 561, n.

(*e*) 1 Bos. & Pull. 225.

(*c*) 9 East, 157.

(*f*) 3 Dow. & Ryl. 226, 2 Barn.

(*d*) 4 Barn. & Ald. 435.

& Cress. 2.

levied before A., B., C., and D., as suitors of the court, and it appeared from the record that it was levied before E., F., G., and H.; and this was held to be no variance, as it was unnecessary to state or prove the names of the suitors, and the allegation might be rejected as surplusage. In *Stoddart v. Palmer* (g), in an action for a false return to a fi. fa., the declaration stated that the plaintiff in Trinity Term, 2 Geo. 4, by the judgment, recovered &c. "as appeared by the record," and the proof was of a judgment in Easter Term, 3 Geo. 4: it was held that this was no variance; for that the averment "as appears by the record," was surplusage, and might be rejected, inasmuch as the judgment was not the foundation of, but mere inducement to the action. In *Bromfield v. Jones* (h), in an action against the marshal for an escape, averring the judgment and award of execution against the prisoner for the damages recovered against him, "and thereupon," on such a day, the prisoner was committed to the custody of the marshal, and escaped—it was held to be unnecessary to prove that a sci. fa. had been sued out upon the judgment, the allegation being immaterial. And in *Ditcham v. Chivis* (i), in an action on the case against the proprietor of a stage-coach, for an injury sustained by a passenger through the carelessness of the driver, the declaration alleged that the defendant was the owner of a stage-coach for the conveyance of passengers from London to Blackheath, and that the plaintiff had agreed to become a passenger, and that the defendant had agreed to receive her as such passenger to be carried from London to Blackheath; and the evidence was, that the words "London to Blackheath" were painted on the coach door, that the coach was licensed to run from Charing-Cross only, and

(g) 4 Dow. & Ryl. 624, 3 Barn.
& Cress. 2.

& Cress. 380.

(i) 1 Moore & Payne, 735, 4

(h) 6 Dow. & Ryl. 500, 4 Barn.

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that the plaintiff was taken up at the Elephant and Castle in St. George's Fields: it was held, that, as Charing-Cross and St. George's Fields are both in common parlance styled London, the variance was immaterial, and the allegation sufficiently proved. All these cases tend to shew, that, if there be a variance between the statement in the declaration of introductory matter which need not be proved, and the proof given of such introductory matter, it does not vitiate the declaration.

Then, were the parties who condemned the goods not properly qualified by law? Fowler was the broker employed to make the distress: but it appears that Procter, one of the appraisers, was present at the time of the distress, demanding the rent, and acting in aid of Fowler. The statute 2 William & Mary, sess. 1, c. 5, s. 2, requires the person distraining "to cause the goods and chattels so distrained to be appraised by *two sworn appraisers*." In *Westwood v. Cowne* (*k*) and *Andrews v. Russell* (*l*) it was held to be irregular and illegal to swear the person who distrains as one of the appraisers; and in *Lyon v. Weldon*, Lord Chief Justice Best says (*m*): "The statute 2 William & Mary provides that the person making the distress should cause the goods to be appraised by two sworn appraisers, and that person cannot appoint himself one of those appraisers, as, by doing so, he would defeat the object of the legislature, who intended that such appraisers should be a check on the party distraining."

The next question is whether the defendant Johnston is liable in this action. It is perfectly clear that an act done by one of a firm in the ordinary course of business renders all the partners liable. But it is said that a party signing an authority to distrain on behalf of a client is not responsible for any irregularity committed by the broker em-

(*k*) 1 Stark. N. P. C. 172. Bridgman), p. 81 (d).
 (*l*) Bul. Ni. Pri. 7th edit. (by (*m*) 9 J. B. Moore, 635.

ployed by him: and *Stone v. Cartwright* was cited in support of that proposition. That case, however, is essentially distinguishable from the present; the party there was a mere agent employed in the superintendence of a mine: but attorneys are often principals in reference to the employment of persons on behalf of their clients: and here the authority to distrain does not disclose either the name of the landlord or that of the committee. This is not like the case of the employment of a public officer, where the attorney has no power of selection; in which case he is charged only where he is an actor, as, if he stand by whilst the sheriff's officer is executing a writ, and direct particular goods to be seized, or the like. The nature of the employment was such as to create a contract between Fowler and Johnston & Farquhar, and therefore they were not so acting as to excuse them from liability.

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Mr. Serjeant *Spankie* and Mr. *Kelly*, in support of the rule.—The allegation that the distress was made for rent due under a demise by Johnston and Vaughan, was a material and necessary allegation, and the very foundation of the action; for, that being disproved, the act complained of is shewn to have been a trespass, and therefore the plaintiff's remedy misconceived. This form of action is founded on the circumstance of there being a right to distrain, and a distress lawfully made, but some irregularity committed in the mode of disposing of it. Construing the statute of Marlebridge and the 11 Geo. 2, c. 19, in pari materia, it is clear that this description of action cannot be maintained in any case in which replevin would lie: both statutes assume the distress to be rightful, and a subsequent irregularity in the manner of conducting it (n). Suppose this objection were raised in a special plea, would

(n) See *Bradly on Distresses*, p. 276.

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it not afford a defence to the action? or, suppose judgment were recovered in this action, would not the defendants have a right to require that the record should be so framed as to enable them, in the event of a second action against them for the same cause, to plead the recovery in the former? If a party distrain in the name of one who is not the landlord of the premises, he is a trespasser, and case will not lie against him. The ground of decision in *Ditcham v. Chivis* was, that the parties must have understood and used the word London as it is used in common parlance. All the other authorities cited turned on this principle, viz. that the allegations were not essential, not of the substance of the action, and therefore might have been omitted. Here, however, the variance is in a matter that goes to the gist of the action, because it goes to the form of it. The allegation of the demise was most material, and could not be withdrawn. The case of *Webb v. Hill* (o) is expressly in point. There, in an action for a malicious arrest, it was held that the allegation that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy &c.", was not supported by proof of a discontinuance; and that such an error in the record was not amendable at Nisi Prius, under the statute 9. Geo. 4. c. 15, not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof.

The mode in which the goods were appraised was a literal compliance with the statute. It is clear from the recitals that the "person distraining" means the landlord. That which Lord Chief Justice Best, in *Lyon v. Weldon*, assumes to have been the object of the legislature, is amply attained in this case, by an appraisement by two indifferent persons, neither of whom is the "person distraining." Although Procter appeared to have acted in

(o) Moody & Malkin, 253.

some degree on the making of the distress, it was only as representing Fowler, the person employed to seize, and in whose name the notice of distress was given.

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Lord Chief Justice TINDAL.—It appears to me to be sufficient on the present occasion to decide on the first point that has been argued before us, viz. as to the variance between the declaration and the evidence. The second count states that the goods were seized by the defendants “as, for, and in the name of a distress for certain arrears of rent due to Johnston and Vaughan for and in respect of the premises, upon a certain demise of the said premises.” This is in substance an allegation that rent was due in respect of the premises in question, upon a demise made by Johnston and Vaughan. Upon the evidence at the trial it appeared that the demise under which the plaintiff held was made either by Burd, the lunatic, or by Mrs. Thom, the committee of the person and estate of Burd, and not by Johnston and Vaughan. The question is whether that variance is material or not. In order to decide this question, we must look at the nature of the action, and see how it affects the relation between these parties, and the rights out of which the injury complained of arises. The action is founded on the statute 11 Geo. 2, c. 19, which, in order to prevent injury to landlords by their being made trespassers ab initio in consequence of any slight irregularity in the mode of making distresses, by section 19—after reciting “that it hath sometimes happened, that, upon a distress made for rent justly due, the directions of the 2 William & Mary, c. 5, s. 2, have not been strictly pursued, but through mistake or inadvertency of the landlord or other person entitled to such rent and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done, in the disposition of the distress so seized

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or taken as aforesaid, for which irregularity or tortious act the party distraining hath been deemed a trespasser ab initio, and in an action brought against him as such the plaintiff hath been entitled to recover and has actually recovered the full value of the rent for which such distress was taken; and that it was a very great hardship upon landlords and other persons entitled to rents, that a distress duly made should be thus in effect avoided for any subsequent irregularity"—enacts, "that, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs." The words of this enactment are—"for any kind of rent justly due:" and the fair intendment is, that it must be for rent due for the premises upon which, and to the party by whom, the distress is made. If no rent is due, the occupier of the premises has a right to pursue his ordinary remedy by an action of trespass—the form of action given by the statute being given only where trespass will not lie. This will appear to have been the intention of the legislature, by referring back to the 5th section of the 2 William & Mary, sess. 1, c. 5, which enacts, "that, in case any such distress and sale as aforesaid shall be made by virtue or colour of this act for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold

as aforesaid; his executors or administrators, shall and may by action of trespass or upon the case to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit." This therefore again shews that the character in which the rent becomes due, the party to whom it becomes due, and by whom the distress is made, are all material allegations; because, supposing no rent to be due, the party distrained on would be entitled to sue the distrainor in trespass. It is compulsory on the plaintiff to shew upon the face of his declaration the real parties to whom the rent is alleged to be due. Taking it at common law, I think this particular allegation is one that the defendant might have traversed by his plea; and, had it been traversed, the issue thereon must have been found for the defendants. Under the new rules of pleading, this is a matter that may properly be made the subject of a traverse. Several cases have been cited in the course of the argument, wherein it has been held that a mistake in an allegation of time or place that was immaterial, and only matter of venue, would not invalidate the statement in the declaration. But, if the allegation be of the contract, or of the relation between the parties, it seems to me that it is of the very essence of the action, and must be correctly stated. The case of *Pool v. Court* (*p*) is expressly in point: there, the defendant's tenancy of land in Fiddington at a certain rent was alleged as the consideration for his promise to manage it in a husband-like manner; the land for which the rent was reserved was in Fiddington and *Chaddington*: and this was held to be a fatal variance in stating the consideration for the promise. "Since the declaration," says Sir James Mansfield, "states that all the land lay in the parish of Fid-

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dington, and that the land lying in the parish of Fiddington was let at a certain rent, the declaration is not good, for the land in the parish of Fiddington was not let at the certain rent therein mentioned; therefore the objection must prevail." In that case, it might have been urged, as here, that the allegation was of an immaterial fact: but, inasmuch as it was a statement of the contract, and a specification of the relation of landlord and tenant subsisting between the plaintiff and defendant, it was held necessary that it should be accurate. *Morgan v. Edwards* (*q*) is also somewhat in point, though not so closely applying to the present case as *Pool v. Court*. There, in an action of covenant on a lease "of the veins of coals under certain farms and lands therein described, situate in the parishes of B. and M., &c.," the declaration varied from the deed, amongst other things, in stating the lands to be situate in the parish of B. and M., instead of the parishes of B. and M.; and it was held that the variance was fatal. Upon the whole, both on principle and on the authority of *Pool v. Court*, I am of opinion that the variance in the present case is fatal, and consequently that the rule for entering a nonsuit must be made absolute.

Mr. Justice GASELEE.—I am of the same opinion. The principal authorities relied on for the defendant were cases where the alleged variance was in time or place, and therefore not material. In *Ditcham v. Chivis*, however, the ground of the decision was that the improper description of the journey was adopted by the defendant himself: the Court therefore decided according to the intention of the parties. Suppose this case had occurred since the new rules of pleading came into operation, and the defendant had pleaded that there was no such demise as that alleged in the declaration, and the plaintiff had demurred, could

it have been held that the plea took issue upon an immaterial allegation?

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Mr. Justice Bosanquet.—I am of the same opinion. The variance is in the description of a material point. In an action of tort, where the tort is founded in matter of contract, a misdescription of the contract in the declaration is as much a variance as it would be in an action on the contract itself. Here, the variance is in that which is the foundation of the action. The foundation of the action is, that there was a lawful distress made for rent due in respect of premises demised by Johnston and Vaughan, and that, in the progress of that distress, certain irregularities were committed which entitled the plaintiff to maintain an action on the case under the statute. A variance in the statement of the demise in the declaration and the evidence offered in support of it, was therefore a material and fatal variance.

Rule absolute (r).

(r) And see *Bristow v. Wright*, 2 Doug. 665, 1 Term Rep. 235, n., where in an action on the case against a sheriff for taking goods without leaving a year's rent, the

plaintiff set forth the particulars of the demise in his declaration, and, failing to prove them as set forth, was nonsuited.

ASHLIN v. LANGTON and Two Others.

*Wednesday,
June 11th.*

MR. Mansel, on a former day, obtained a rule nisi to set aside a warrant of attorney, on the ground that one of the parties was an infant at the time it was executed.

Mr. Serjeant Wilde was now about to shew cause: but the Court called on—

Mr. Mansel to support his rule.—He referred to

Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the Court will order it to be vacated as against the latter, and to stand against the other parties.

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Saunderson v. Marr (*a*), where it was held that a warrant of attorney given by an infant is absolutely void, and the Court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion: and to *Wood v. Heath* (*b*), where a judgment entered up on a warrant of attorney was set aside because one of the parties was an infant at the time of the execution of it. And he contended, upon the authority of the case of *Baldwin v. Atkins* (*c*), that the judgment must strictly follow the warrant of attorney; which being impossible in this case, by reason of the infancy of one of the parties, no judgment could be entered up on it at all.

PER CURIAM.—Upon the authority of *Motteux v. St. Aubin* (*d*), we think the warrant of attorney in this case may be vacated as against the infant, and allowed to stand as against the other parties. The rule therefore will be discharged with costs as to the two adults, and the name of the infant may be expunged.

Rule accordingly.

(*a*) 1 Hen. Blac. 75.

(*c*) 2 Dowl. P. C. 591.

(*b*) 1 Chit. Rep. 708.

(*d*) 2 Hen. Blac. 1133.

Thursday,
 June 12th.

HAWORTH v. HARDCASTLE.

The plaintiff obtained a patent for machinery adapted to facilitate the drying of calicoes, &c.

THIS was an action on the case for an alleged invasion by the defendant of the plaintiff's patent right, obtained

The specification, after describing the mode of hanging out the cloth for the purpose of drying it, also stated that it might be taken up again when dry, by a contrary motion of the machinery. In an action for an invasion of the patent, the jury found "that the invention was new, and useful upon the whole, and that the specification was sufficient for a mechanic properly instructed to make a machine, and that there had been an infringement of the patent; but they also found that the machine was not useful in some cases for taking up goods:"—The Court refused to set aside a verdict entered for the plaintiff on this finding.

for the application of certain machinery or apparatus adapted to facilitate the operation of drying calicoes, muslins, linens, or other similar fabrics.

The cause was tried before Mr. Justice Alderson at the Sittings in London after Michaelmas Term, 1833. The evidence was as follows: The old process of drying calicoes, muslins, and the like, was performed in a place called a stove or drying-house, about twenty feet high or upwards, divided into three stages or floors which were formed of rails or staves traversing the building horizontally. The cloth intended to be dried was then carried to the upper part of the drying-house, and dropped by hand over the top row of staves, a man standing on the second row to guide its descent and to give notice to the person above when sufficient had been allowed to fall to form a loop about six feet long: and, when the upper compartment of staves was covered in this manner, the second and lower floors were similarly hung. This method, besides being expensive and tedious, was found very inconvenient, the number of loops and of staves preventing the free passage of the heated air in the stove. A person of the name of Southwell, in the year 1823, obtained the patent for the infringement of which this action was brought, for the adaptation of certain machinery to supersede the labour of man in the process of hanging up and taking down the cloth, and to obviate the other inconveniences that were found to attend the old method of drying it. The plaintiff was the assignee of the patent.

The specification described the invention in the following manner:—

“ My invention consists in the application of certain machinery or apparatus adapted to perform the operation of hanging or suspending damp or wet calicoes, muslins, or other similar fabrics (over a series of rails or staves situate in a stove or drying-house), for the purpose of drying the same: the said machinery being also adapted to perform

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the operation of taking down or removing the said calicoes, muslins, linens, or other similar fabrics (from off the said rails or staves), after they have been sufficiently dried: by means of which invention a considerable saving of labour and expense may be effected in the operation of drying. I construct the stove or drying-house in a manner nearly similar to that at present in use; and I arrange the rails or staves (over which the cloth or fabric is intended to be hung or suspended) near to the upper part of the stove or drying-house. I then construct a frame or carriage in such a manner as to be capable of moving freely upon guides or supports from one end of the drying-house to the other, the said carriage being situated immediately above the range of rails or staves, but so as not to bear upon them. This carriage is furnished with proper supports for receiving certain rollers or boxes, upon the circumference of which rollers or boxes the wet cloth or fabric has been previously wound. The carriage is also furnished with certain cylinders or drums, which are caused to revolve in such a manner as to draw or wind the wet cloth or fabric from off the aforesaid rollers or boxes in a regular manner: thus, if the frame or carriage with its appendages be slowly moved upon its guides above the rails or staves at the same time that the wet cloth or fabric is in the act of being drawn off the circumference of the rollers or boxes by the operation of the revolving cylinders or drums before mentioned, the wet cloth or fabric will descend in the vacancies between the rails or staves, and will hang down in loops or folds, so as effectually to expose its surface to the action of the dry or heated air, and in order to suit the depth or height of the stove or drying-house. The depth or length of the said loops or folds may be regulated or determined by the length of cloth or fabric which would be given out by the revolving cylinders or drums during the passage of the frame or carriage from one stave to the next. When the cloth or fabric has been hanging a

sufficient length of time to become dry, it may be taken up again, or drawn off the rails or staves, and wound again upon the circumference of the rollers. This operation I perform by simply causing the frame or carriage with its appendages of rollers and cylinders to traverse slowly along the drying-house in the contrary direction to what it moved during the operation of hanging the cloth, at the same time that the cylinders or drums are caused to revolve in a suitable direction for taking or winding up the cloth or fabric upon the circumference of the rollers or boxes. By this means the dry cloth may be wound evenly upon the circumference of the rollers or boxes, and removed from the machine. In some situations, I find it advisable to vary the mode of arrangement, by causing the rails or staves (over which the cloth or fabric is intended to be hung) to be connected together with chains or ropes, somewhat in the manner of a rope ladder, being connected by endless chains or ropes with a train or wheels, or other well known machinery, so as to be moved slowly along upon guides from one end of the stove or drying-house to the other: in this last mentioned arrangement, the frame or carriage containing the revolving cylinders or drums for giving out and taking up the cloth remains stationary at one part of the stove or drying-house. The operation of this machinery would be similar to the one before described, with the traversing carriage; for, as the cylinders or drums are caused to revolve and give out the cloth or fabric at the same time that the chain of rails or staves was moving slowly beneath the cylinder or drum, the cloth or fabric would descend between the staves, and hang down in loops or folds, in a manner similar to the machine with the moving carriage." [Here followed drawings of the various parts of the machine, with explanations, in the usual manner. The specification then concluded as follows] :—"I have now described fully one mode of carrying my invention into effect; and I do hereby declare

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that I consider my claim of invention to extend to the application of the machinery or apparatus as hereinbefore described, for the purpose of facilitating the operation of drying calicoes, muslins, or other similar fabrics; which machinery or apparatus is adapted by means of a revolving and traversing cylinder or cylinders situated over a series of stationary rails or staves arranged in a stove or drying-house, in such a manner that the pieces of calico, muslins, linen, or other similar fabrics, may be previously wound upon the circumference, and by the revolving and traversing motion of the aforesaid cylinder or cylinders over the stationary rails or staves, or otherwise by the revolving motion of the cylinder or cylinders, and the traversing movement of the rails or staves themselves, may be caused to descend in the spaces between the said rails or staves, and hang down in long loops or folds, in order to spread the pieces quickly and expose their surfaces so as to facilitate the operation of drying the same: the said machinery or apparatus being also adapted to perform the operation of taking up or removing the said calicoes, muslins, linens, or other similar fabrics from off the said rails or staves, and winding or rolling them upon the circumference of a roller or rollers, so that they may be removed from the machine after being sufficiently dried. At the same time, I must observe that the form and proportion of the different parts may be varied according to the situation or discretion of the workmen employed in constructing the same. The materials of which the same may be made may also be varied according to the circumstances of the case, without departing from the intent and object of my invention, as above described and set forth."

It appeared upon the evidence, that, prior to the year 1823, some drying-houses had been constructed with one row of staves only, placed in the upper part of the building; and also that a machine had some years before been used by Ainsworth & Fogg for the purpose of letting down

cloth from staves placed at the top of a drying-house, consisting of a carriage similar to that used by the patentee, but having only one roller, on which the cloth was placed, and which was turned with a winch. Mr. Fogg, who was called as a witness, stated that he had used this machine for about six months, and then discontinued it, finding it of little use. The defendant had used three machines, one of which was purchased by him from the patentee, but was used without a license; the other two varied in some degree from the patent machine. The latter when traversing the staves was followed by a stop-roller, to determine the length of the loop of cloth, by nipping or pressing it upon the edge of the stave, so as to hold it until the succeeding loop became of sufficient length to balance by its weight the preceding one. This was found not to answer the purpose intended, in consequence of the heat of the drying-house causing the staves to warp; and therefore the inventor substituted a dropping board or flapper; and in one of the machines used by the defendant a bag of shot was the substitute for the stop-roller. It was proved by several witnesses, and amongst others, by the son of the patentee, that the machine did not answer the purpose of taking up some descriptions of cloth, by reason (as some of them stated) of the deception used in the manufacture.

On the part of the defendant it was contended that the patent was void, on the grounds that the specification claimed as new the placing the staves or rails at the top of the drying-house; that it claimed the invention of that which had previously been used by Ainsworth & Fogg and that it was not adapted to the taking up the cloth, as stated in the specification.

The learned Judge left it to the jury to say—whether the invention was new and properly described in the specification—whether the machine was capable of taking up cloth *for any useful purpose*—and whether the machines

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used by the defendant were infringements on the plaintiff's patent, or fair improvements on the original invention of Ainsworth & Fogg.

The finding of the jury was as follows:—"The jury find that the invention is new, and useful upon the whole, and that the specification is sufficient for a mechanic, properly instructed, to make a machine, and that there has been an infringement of the patent: but they also find that the machine is not useful *in some cases* for taking up goods."

A verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to move to set it aside and enter a nonsuit.

Mr. Serjeant *Stephen*, accordingly, in Hilary Term last, moved for a rule nisi to enter a nonsuit on the grounds urged at the trial, and also on the ground that the finding of the jury in effect negatived the usefulness of the invention for which the patent was obtained, to the extent stated in the specification; and also for a new trial on the grounds that the verdict was against evidence, and that the jury had been misdirected—contending that the jury should have been directed to consider whether Southwell's invention was new, regard being had to that of Ainsworth & Fogg; and whether the plaintiff's machine was adapted to the taking up of goods according to the specification, that being a material part of the improvement claimed.—He cited *Turner v. Winter* (a), *Macfarlane v. Price* (b), *Bovill v.*

(a) 1 Term Rep. 602. A patent is void if the specification be ambiguous, or give directions which tend to mislead the public. The specification must be sufficient to enable others to make the invention; as the object is, that, after the term, the public shall have the benefit of the discovery—*Liardet*

v. Johnson, Bull. Ni. Pri. 76—*Newberry v. James*, 2 Mer. 446.

(b) 1 Stark. N. P. C. 199. In the specification of an improved instrument, it is essential to point out precisely what is new and what is old; and it is not sufficient to give a general description of the construction of the instrument

Moore (c), Campion v. Benyon (d), Rex v. Wheeler (e), Brunton v. Hawkes (f), Felton v. Greaves (g), Rex v. Else (h), and Bloxham v. Elsee (i).

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without making such distinction, although a plate is annexed containing a detached and separate representation of the parts in which the improvement consists. But see *Bloxam v. Elsee*, 1 Car. & Payne, 558.

(c) 2 Marsh. 211. Where a person obtains a patent for a machine consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct in setting out the whole as the invention of the patentee; but, if a combination of a certain number of those parts have previously existed up to a certain point in former machines, the patentee merely adding other combinations, the specification should only state such improvements, though the effect produced be different throughout.

(d) 6 J. B. Moore, 71, 3 Brod. & Bing. 5. A patent was obtained for "a new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, without any starch whatever," and the specification described the invention to consist in an improved texture or mode of twisting the threads, to be applied to the making of unstarched cloth: it being proved at the trial that the exclusion of starch had been before adopted—it was held that the patent was void, as being taken

out for more than the patentee had really discovered.

(e) 2 Barn. & Ald. 345. A patent was taken out for "a new or improved method of drying and preparing malt." In the specification it was stated that the invention consisted in exposing malt previously made to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state (whether moist or dry) in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process was accomplished. It was held that the patent was void, the specification not being sufficiently precise, and the patent appearing to be for a different thing from that mentioned in the specification.

(f) 4 Barn. & Ald. 541. A patent for an improvement in the construction of ships' anchors and windlasses, and chain-cables, cannot be supported unless there is novelty in each invention.

(g) 3 Car. & Payne, 611. A patent was granted for a machine to sharpen knives and scissors, and in the specification this was directed to be done by passing their edges backward and forward in an

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The rule was refused on the ground of misdirection, and granted on the other points.

Mr. Serjeant *Wilde* and Mr. Serjeant *Coleridge*, in Easter Term, shewed cause.—The substance of the patent was an invention of machinery adapted to facilitate the drying of the goods mentioned in the specification: and the patent is not avoided because the inventor has gone on to state that the machinery is also adapted to the taking up the cloths when dry. In the cases cited on the part of the defendant, the patents were held to be void because the several machines or the processes described in the specifications were utterly unadapted to the accomplishment of the purposes for which they were intended. Here, the main object which the patentee professed to attain has been accomplished: as far as regards the letting down the cloths, it is admitted that the machine is faultless; and it is constructed and worked precisely in the mode pointed out in the specification, with the exception of a flapper being sub-

angle formed by the intersection of two circular files; and in the specification it was also stated that other materials might be used, according to the delicacy of the edgea. It was proved that for scissors there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed. It was held that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones, nor with one circular file and a smooth surface.

(b) Bull. Ni. Pri. 76, 11 East, 109, n. A patent must not be more extensive than the invention, therefore, if the former be

for a whole machine or manufacture, and the latter only consists in an addition or improvement, it is void.

(i) 9 Dow. & Ryl. 215, 6 Barn. & Cress. 169, 1 Car. & Payne, 558, Ryan & Moody, 187. A patent being granted upon a specification that the machine was capable of performing all the operations necessary to the perfection of the proposed invention; and it appearing that a second patent was taken out for improvements necessary to the efficient operation of the original machine—it was held, that, the consideration of the first patent having failed, both patents were void.

stituted for the stop-roller, which was found not to work well where in consequence of the staves or rails warping an uneven surface was presented. Even supposing the taking up to be an essential part of the invention, the finding of the jury does not negative the general usefulness of the machine in this particular, though it states it not to be useful *in some cases*—evidently pointing to those cases adverted to by the witnesses, viz. where the goods were fraudulently manufactured. In *Crossley v. Beverley* (*k*), it was held that if, in the specification of an improved gas apparatus, no direction is given respecting a condenser, which is a necessary part of every gas apparatus, this will not invalidate the patent, if it appear that every one capable of constructing a gas apparatus must know that a condenser must form a part of it. In *Lewis v. Marling* (*l*), it was held that a patent is not avoided by the specification claiming as part, but not as a necessary part of the invention, something which proves to be useless; and that a patent for a machine invented and first brought into use by the patentee, is not avoided by evidence of a similar machine having been previously invented by another, by whom it was never brought into use in this country. “I agree,” said Lord Tenterden, “that, if a patentee insert in his specification, as a necessary ingredient in the patent article, any thing which proves not to be necessary, or even useful, and thereby misleads the public, his patent may be void; but I think it would be too much to say that this patent is void because the plaintiffs claim to be the inventors of a particular part of the machine, not described in their specification as necessary, and which turns out not to be useful. Several of the cases already decided have borne with sufficient rigour upon patentees, but no case

(*k*) 9 Barn. & Cress. 63, Moody & Malkin, 283, 3 Car. & Payne, 513, 1 Russ. & Mylne, 166. And see *Jones v. Pearce*, Godson on Patents, Supplement, p. 10.
 (*l*) 5 Man. & Ryl. 66, 10 Barn. & Cress. 22, 4 Car. & Payne, 52.

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has yet gone the length of deciding that such a claim renders the patent void, and I for one am not disposed to create such a precedent." And Mr. Justice J. Parke said: "The objection to the patent, as explained by the specification, is, that it is for several things, one of which was then supposed to be useful, and is now found to be not so. Now, although it has been decided that all the parts of an invention for which a patent has been granted must be new, it has never been decided that they must all continue to be useful. The law has not yet gone to that extent, nor do I think it desirable that it should. The prerogative of the crown as to granting patents was restrained by the statute 21 Jac. 1, c. 3, s. 6, 'to the true and first inventors of manufactures, which others at the time of granting the patent shall not use.' The condition therefore is, that the thing shall be new, not that it shall be useful; and, though the question of utility has been sometimes left to the jury, it appears to me that the condition imposed by the statute is complied with, if the subject-matter of the patent is proved to be new."

Mr. Serjeant *Stephen* and Mr. Serjeant *Bompas*, in support of the rule.—The machine failed in two important particulars to perform that which the specification stated it to be adapted for; first, in the stop-roller, which was found wholly useless, and was abandoned by the inventor; secondly, in the taking up, which the jury have found that it was not useful for to the extent claimed. The objects of the specification being to shew the public the ground from which they are excluded, and also to enable them after the patentee's term has expired to construct the article, unless it answers these ends the patent is void. No doubt, here, the entire combination—of progressive and rotatory motion—was new: but the specification is too large.—There are two kinds of patent—the one for machinery—the other for the adaptation of certain known

machinery to particular uses: in the former case, to use the machinery would be piracy; in the latter, it may lawfully be used for any other purpose. Here, the patent is taken out for machinery; and the specification is for the application of machinery only. This of itself is sufficient to avoid the patent. Besides, the patentee claims as part of his invention that which was proved to have been done for years before the granting of the patent, viz. the placing the rails or staves on a single floor at the top of the drying-house.—In a case of this description, where there is fair ground for doubt, it is not necessary that the Court should be *satisfied* that the verdict is wrong; but they will lean to a new trial unless they see good ground to be quite satisfied that a contrary verdict is morally impossible.—At all events, the finding of the jury being ambiguous, there should be a *venire de novo*—*Rex v. Woodfall* (m).

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This case has been brought before us upon a motion for a rule either to enter a nonsuit, upon leave given for that purpose by the Judge at the trial, or for a new trial, on the ground of misdirection of the learned Judge who tried the cause, and also that the verdict of the jury has been given against the weight of the evidence. Upon the discussion which took place upon the original motion, the Court were satisfied that the direction of the learned Judge was right, and the rule was consequently granted upon the two remaining grounds only. The motion for entering a nonsuit was grounded on two points—first, that the jury had by their special finding negatived the usefulness of the invention to the full extent of what the patent and specification had held out to the public—secondly, that

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the patentee had claimed in his specification the invention of the rails or staves over which the cloths were hung; or, at all events, the placing them in a tier at the upper part of the drying-house.

As to the finding of the jury, it is in these words—“The jury find the invention is new, and useful upon the whole, and that the specification is sufficient for a mechanic, properly instructed, to make a machine, and that there has been an infringement of the patent; but they also find that the machine is not useful, in some cases, for taking up goods.” The specification must be admitted, as it appears to us, to describe the invention to be adapted to perform the operation of removing the calicoes and other cloths from off the rails or staves after they have been sufficiently dried. But we think we are not warranted in drawing so strict a conclusion from this finding of the jury as to hold that they have intended to negative, or that they have thereby negatived, the usefulness of the machine in the generality of the cases which occur for that purpose. After stating that the machine was useful *on the whole*, the expression that, *in some cases*, it is not useful for taking up goods, appears to us to lead rather to the inference that, in the generality of cases, it is found useful. And, if the jury think it useful in the general, we think it would be much too strong a conclusion to hold the patent void because some cases occur in which it does not answer. How many cases occur, what proportion they bear to those in which the machine is useful, whether the instances in which it is found not to answer are to be referred to the species of cloth which are hung out, to the mode of dressing the cloths, to the thickness of them, or to any other cause distinct and different from the defective structure or want of power in the machine, this finding of the jury gives us no information whatever. Upon such a finding, therefore, in a case where the jury have given their general verdict for the plaintiff, we think that we should act with great hazard and precipitation if we were to hold that

the plaintiff ought to be nonsuited, upon the ground that his machine was altogether useless for one of the purposes described in his specification.

As to the second ground upon which the motion for a nonsuit proceeded, we think, upon the fair construction of the specification itself, the patentee does not claim as part of his invention either the rails or staves over which the calicoes and other cloths are to be hung, or the placing them at the upper part of the building. The use of rails or staves for this purpose was proved to have been so general before the granting of this patent, that it would be almost impossible *a priori* to suppose that the patentee intended to claim what he could not but know would have avoided his patent; and the express statement he makes, "that he constructs the stove or drying-house in a manner nearly similar to those which are at present in use, and that he arranges the rails or staves on which the cloth or fabric is intended to be hung or suspended near to the upper part of the said stove or drying-house," shews clearly that he is speaking of those rails or staves as of things then known and in common use; for, he begins with describing the drying-house as *nearly similar* to those in common use: he gives no dimensions of the rails or staves, no exact position of them, nor any particular description by reference, as he invariably does when he comes to that part of the machinery which is peculiarly his own invention. There can be no rule of law which requires the Court to make any forced construction of the specification, so as to extend the claim of the patentee to a wider range than the facts would warrant; on the contrary, such construction ought to be made as will, consistently with the fair import of the language used, make the claim of invention co-extensive with the new discovery of the grantee of the patent. And we see no reason to believe that he intended under this specification to claim either the staves or the position of

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the staves as to their height in the drying-house, as a part of his own new invention.

As to that part of the rule which relates to the granting of a new trial, on the ground of the former verdict being against evidence—this case comes before us under such peculiar circumstances, that, unless we were thoroughly satisfied that the verdict was wrong, we hold that we ought not to interfere. The trial took place before a special jury; it occupied two days of close and laborious investigation; the questions whether the invention was new, and whether there was any infringement, were specifically and pointedly left to the jury; and the jury found their verdict for the plaintiff, which verdict we are authorised to say was entirely to the satisfaction of the learned Judge who presided at the trial. These circumstances alone would be sufficient in ordinary cases to induce the Court to refuse to interfere. But, in addition to these strong grounds for the course we take on this occasion, it should be observed that this is the case of a patent granted in the year 1823, having therefore now only three years longer to remain in force; and, further, the defendants or some other persons have, since this action has been tried, procured a scire facias to be filed, to avoid the patent. As this is a mode of trial in which the precise objections to the patent may be raised by the pleadings, and the questions made on the former trial may be carried by writ of error to a higher tribunal, we do not feel ourselves called upon, unless upon a much stronger case than the present, to take away from the plaintiff the benefit of the verdict which the jury have given him. If this further proceeding by scire facias had not been instituted and now pending, we might have felt ourselves called upon to discuss and consider one objection advanced by the learned counsel for the defendant—viz. that the patent is taken out for machinery, whereas the specification is made for the application of

machinery, or for a method only. But, as this objection as well as the others can receive a more solemn decision upon the occasion to which we have adverted, we shall offer no opinion on it now—which we think we are the less called upon to do on this occasion, as it was not an objection taken upon the trial of the cause before the jury, but for the first time raised when the defendant was heard in support of his rule.

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Rule discharged.

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Thursday,
June 12th.

THIS was an action of debt on the statute 2 & 3 Edward 6, c. 13, brought by the plaintiffs, the impropriators of the great or rectorial tithes of the parish of Kingston-upon-Thames, against the defendant, an occupier of land in the parish, for not setting out the tithe of potatoes grown by him in fields cultivated by the plough. The cause was tried before Lord Chief Baron Lyndhurst, at the last Assizes for Surrey. The question at issue between the parties was whether the tithe of potatoes so grown was rectorial or vicarial.

On the part of the plaintiffs the following evidence was produced:—Two grants under the great seal, the one dated the 19th May, 1609, the other the 15th December, 1640, of the rectory of Kingston-upon-Thames, and all manner of tithes and other profits to the rectory belonging.

Long and constant perception by the vicar of tithes not mentioned in the endowment, or the non-perception of any species of tithes which are mentioned therein, with evidence of their perception by the rector, will afford a sufficient ground for presumption by a jury that such augmentation or alteration of the endowment has been made by some ancient and lawful or

voluntary agreement.

By an indowment of 1374, the vicar of Kingston was endowed of all small tithes arising within the vicarage, except what was specially reserved to the prior and convent of Merton. In an action by the impropriators of the rectorial tithes, on the statute 2 & 3 Edward 6, c. 13, against the defendant for not setting out the tithe of potatoes grown by him within the parish, it appeared that there was a custom within the parish that all roots and vegetables grown in open fields, when cultivated by the plough, should go to the rector, and, when cultivated by the spade, should go to the vicar: and there was also evidence of enjoyment of tithe of potatoes by the rector from a very early period:—Held, that the jury were warranted in finding the tithe of potatoes to be rectorial, notwithstanding the indowment of the vicar, and the fact that potatoes were not introduced into this country until after the restraining statute 13 Eliz. c. 20.

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The grant of 1609 described the rectory as having 'formerly been parcel of the possessions of the late monastery or priory of Merton.—The following extract from the Valor Ecclesiasticus of the 26 Hen. 8, relating to the vicarage of Kingston-upon-Thames :—“ It values in tithes of geese, 4*s.*, pigs, 16*s.*, doves, 10*d.*, eggs, 3*s.* 4*d.*, hemp, 1*s.* 4*d.*, fruits, 2*s.*, gardens, 8*s.*, woods, 13*s.* 4*d.*, tiles, 4*s.*, personal tithes, otherwise privy tithes, 9*l.* 5*s.* 9*d.*, cows, 26*s.* 8*d.*, calves, 10*s.*, honey and wax, 2*s.*, osiers, 1*s.* 4*d.*, chickens, 1½*d.*, &c., &c.” — the total amount being 54*l.* 13*s.* 3*d.*—A return in the 3rd year of the reign of queen Elizabeth, to an inquisition of the 6th Edward, from the court rolls of the first fruits in the Exchequer, which shewed that the vicar, instead of receiving 54*l.* 13*s.* 4*d.* for the vicarial tithes, only received 25*l.* 5*s.* 10½*d.*, whereupon judgment of diminution was given.—An extract from the records of the First Fruits' Office of the return made by the bishop of Winchester, in pursuance of the statute 5 Anne, c. 24, for discharging small livings from their first fruits and tenths, and all arrears thereof; from which return (dated 28th of March, 7 Anne, 1707,) it appeared that the clear improved yearly value of the vicarage of Kingston was 34*l.* 7*s.* only.—A conveyance of the rectory, dated in 1738, which was also produced, purported to convey—“ All and singular the tithes of corn, grain, wheat, rye, barley, beans, peas, *potatoes*, tares, oats, French wheat, hay, wool, and lamb, and all and all manner of tithes of what nature or kind soever to the rectory of Kingston-upon-Thames aforesaid belonging or in any wise appertaining, coming, growing, renewing, happening, or increasing, and which at any time or times hereafter shall or may be coming, growing, renewing, happening, or increasing in Norbiton, Surbiton, Comb, Hatch, Ham, Kew otherwise Kayho, Petersham, Sheen otherwise Richmond, or elsewhere within the said parish of Kingston-upon-Thames, to the said rectory be-

longing or in any wise appertaining." And it was proved that every subsequent deed relating to the rectory contained the same grant of potatoes; and that such tithe had been included in leases of the tithes granted by the rectors, under which leases the rents reserved by the leases had been paid. It also appeared, that, as far back as living memory went, the tithes of potatoes grown in fields had always been paid to the rector, and the tithes of potatoes and other roots grown in gardens, to the vicar:—the general reputation in the parish being, that the vicar followed the spade, and the rector the plough.

For the defendant an indowment of the vicarage of Kingston was put in, bearing date in the year 1374. whereby the vicar was indowed of all small tithes save those specially reserved to the prior and convent of Merton. The parts of the indowment applicable to the present case were as follows:—"Also the said vicar may take the tithes of cows, calves, goats, kids, pigs, rabbits, and other wild animals of what kind soever; of fowls, doves, swans, peacocks, geese, ducks, and of all other fowls of whatsoever kind; also of cheese, milk, and other things made of milk; of bees, honey, wax, and eggs."—"Also the said vicars may take the tithe of flax, hemp, and warrens wheresoever and whatsoever, arising through the whole parish of the church and chapels aforesaid; and of corn in gardens or curtilages of the said parish of the said church and chapels aforesaid dug or hereafter to be dug with the foot; of herbs also, and of all other things growing in the same, which were not of the manors of the aforesaid prior and convent. And if it shall happen in time to come that any gardens of the said parish shall be turned up or levelled, and the lands thereof tilled by the plough, then the said prior and convent shall wholly take and have the tithes of corn (bladorum) of such gardens and lands so ploughed up. And if it shall happen hereafter that any arable lands which are not of the manors of

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the said prior and convent shall be reduce to gardens, and dug with the foot, then the aforesaid vicars shall take and have the tithes of corn arising from such gardens for the time in which they shall be dug and tilled with the foot. Also the said vicars may take the tithes of feedings, pastures, and agistments of animals; of pannage, willows, and osiers, and of fallen wood for fire whatsoever, and of vines and of the fruit of trees of every kind wheresoever arising within the parish of the church aforesaid and the chapels aforesaid, except from the manors aforesaid. Also the said vicars may take all tithes whatsoever of lambs, wool, and hides, to the chapels of Dytton, Mulesey, and Shene arising, except from the animals of the said prior and convent at Mulesey, and except from the animals of the farmers of the same religious as aforesaid."—"Also the said vicars may take the small tithes whatsoever of custom or of right due throughout the whole parish of the church of Kingston and the chapels aforesaid by any manner arising, and by whatsoever name distinguished, those only to be excepted which are specially reserved to the said prior and convent."—"And the religious men, brother Robert of Wyndesore, the now prior, and his successors, the priors and convent aforesaid, shall for ever take and have the great tithes of sheaves arising without the said gardens, and of hay, and of living mortuaries, and the tithe of wool and lamb and hides of the village of Kingston and Norbilton, Sorbelton, Combe, Hertyngdon, Hatch, Hamme, Petersham, and La Hake and Berewell, and all other tithes and profits and ecclesiastical emoluments within the said parish arising, or to the said church and chapels belonging, as well those above reserved to the same religious men, as whatsoever other things to the aforesaid now vicar, for him and his successors, vicars, and for his vicarage aforesaid, and for their portion in this behalf, are not above assigned, nor by the tenor of these presents are in any manner soever or-

dained, not containing the same portion or appointment to the now vicar, and his successors, vicars of the aforesaid vicarage, as aforesaid assigned or made."

In the collecting book of the vicar's collector, which was put in, were mentioned tithe of "fruits, gardens, woods, cows, and osiers." It also appeared that certain land in the parish of Kingston had been inclosed under an act of parliament to which both the then rector and vicar were parties, and wherein it was stated that the vicar was entitled to the small tithes of the parish, and an allotment was made to him thereon.

A verdict having been found for the plaintiffs—

Mr. Serjeant *Spankie*, in the last term, obtained a rule nisi for a new trial, on the ground that the verdict was against evidence. He contended that the vicar was by the indowment declared entitled to all the small tithes except those reserved to the prior and convent of Merton; that there was nothing to warrant a presumption of a new indowment, since potatoes were not introduced into this country, or, at all events, not as an article of general or agrarian cultivation, until a period long subsequent to the restraining statutes of the 13 Eliz. c. 10, 20.—He cited *Smith v. Wyat* (*a*), where, potatoes being sown in great quantities in a common field, the rector brought his bill for them as a great tithe; and Lord Hardwicke held, that, potatoes being in their nature a small tithe, the sowing them in greater quantities makes no difference. He also cited *Clarke v. Stapler* (*b*), *Kennicott v. Watson* (*c*), *Payne v. Powlett* (*d*), *Cartwright v. Basley* (*e*), and *Manby v. Curtis* (*f*).

(*a*) 2 Atk. 364. 2 Eagle & Younge, 91.

(*b*) 2 Eagle & Younge, 221, 3 Wood, 121, Gwill. 926.

(*c*) 2 Price, 250, 2 Eagle & Younge, 690.

(*d*) 3 Eagle & Younge, 1316, 4 Wood, 233, Gwill. 1247.

(*e*) 2 Eagle & Younge, 321, 3 Wood, 146, Gwill. 938.

(*f*) 3 Eagle & Younge, 733, 2 Price, 284.

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Mr. Serjeant *Wilde* and Mr. *Platt*, on a former day in this term, shewed cause.—The rector is *prima facie* entitled to all tithes; and nothing goes to the vicar that is not expressly shewn by the indowment to belong to him. By the indowment of 1374, the vicar is entitled to all the small tithes except those that are expressly reserved to the prior and convent of Merton; and it is said that potatoes being *per se* small or vicarial tithe, and not having been introduced into culture in this country until long after the passing of the restraining statutes, no alteration in the indowment can be presumed in respect to them, inasmuch as such alteration, to be legal, must be shewn to have taken place prior to the passing of those statutes. It may be admitted that such is the case, and consequently that no specific agreement as to potatoes by name could have taken place before the statutes: but still an indowment may be limited or enlarged; and such an agreement may have been made as to the class of tithe to which potatoes belong, as would govern the tithe of potatoes when they were afterwards introduced—for instance, supposing an agreement to have taken place, upon sufficient consideration, before the passing of the restraining statutes, that all roots and vegetables grown in open fields, when cultivated by the plough should go to the rector, and when cultivated by the spade should go to the vicar, such agreement would be valid and would comprehend potatoes when they came into general use; those who were competent to do so having adopted as the test the mode of cultivation. In *Jackson v. Woodroffe* (g) it was held, that, where no indowment can be found, and *all* small tithes have usually been received by the vicar, the presumption is that he is indowed with all small tithes, and any new titheable matter arising within the parish ought to be presumed to have been comprised in the indowment: but that this rule

(g) 3 Eagle & Younge, 1302, 4 Wood, 181, Gwill. 1231.

ought to be applied with equal attention to the claims of the rector; and therefore, where the usage had been in opposition to the vicar's claim, the Court held the tithe in question (hops) to belong to the rector. There is no class of cases in which so much weight is given to evidence of usage as in tithe cases. Thus, perception by the rector of tithe mentioned in the indowment, or by the vicar of tithes not mentioned therein, goes far to prove that a valid alteration has been made in the indowment. Lamb and wool are mentioned in this indowment as tithes payable to the vicar: the documentary evidence produced at the trial shews that they are not so now: and there are various other discrepancies between the indowment and the mode of enjoyment by the vicar at the present day; all which tend to strengthen the presumption of an alteration therein. Besides, here it appears that the vicar has never received the tithe of potatoes, and therefore, whether it be a great or a small tithe, he is not now entitled to it—*Daws v. Benn* (*h*): and there is evidence of enjoyment by the rector.

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Mr. Serjeant Spankie and Mr. Comyn, in support of the rule.—Where the rector claims in opposition to an express indowment, the presumption is against him—*Dorman v. Currey* (*i*). In the present case, the vicar's right has never before come into dispute, he having always received the general composition: and there is no evidence whence the jury could infer a legal origin of right in the rector. Lord Chief Baron Gibbs, in *Kennicott v. Watson*, says (*k*): “It has been again and again determined that tithes of modern introduction are vicarial tithes; that is the case of turnips and potatoes, and though of field cultivation they are still such.”

Cur. adv. vult.

(*h*) 1 Barn. & Cress. 751.

Price 109, 1 Wils. Exch. Rep. 46.

(*i*) 3 Eagle & Younge, 817, 4

(*k*) 2 Price, 260, n.

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The plaintiffs in this case declared in debt upon the statute 2 & 3 Edw. 6, as proprietors of the rectorial tithes within the parish of Kingston, against the defendant, an occupier of lands within the parish, for not setting out the tithes of potatoes grown by him within the parish. The jury found their verdict for the plaintiffs; and a rule has been obtained for setting aside that verdict, as against the evidence in the cause. The question at the trial was whether potatoes grown in a field, which field was under the plough, were rectorial or vicarial tithes in the parish of Kingston; for, if such tithes were rectorial, the plaintiffs, as proprietors of the rectorial tithes, were entitled to recover.

On the part of the defendant it was contended that such tithes were vicarial; and the indowment of the vicar, made in 1374, by the prior and convent of Merton, was produced in evidence, by which, after a specific enumeration of the tithe of various articles with which the vicar is indowed, he "is indowed generally with all small tithes whatever due by custom or right, arising through the whole parish of the church of Kingston, and of the chapels aforesaid, except those only which are specially reserved to the prior and convent aforesaid;" and it was urged on the part of the defendant, that, as potatoes, whether sown in small or great quantities, whether in fields or gardens, are small tithes, the tithes of potatoes by the very terms of this indowment must belong to the vicar, not to the rector. Such is undoubtedly the construction of this instrument of indowment: but it is well established, that the original indowment may have been altered by a new and subsequent indowment made by all parties whose concurrence is necessary, before the restraining statutes; and again, that long and constant perception by the vicar of

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tithes not mentioned in the indowment, or the non-perception of any species of tithes mentioned therein, with evidence of their perception by the rector, will afford a sufficient ground for presumption by a jury that such augmentation or alteration of the indowment has been made by some antient and lawful or voluntary agreement. The law is so well known on this head, that it is unnecessary to cite any cases: the result being this, that such an alteration may be valid in point of law, but that the burthen of proving that it has taken place in point of fact in any particular case, is thrown upon the rector.

Now, it is argued by the defendant, that no such agreement can be presumed in point of law in the present case; because such alteration, in order to be valid, must have taken place before the restraining acts, 13 Eliz. cc. 10, 20; and it is generally allowed that potatoes were not known in England, or at all events, not cultivated in open fields, prior to that time. To that objection the answer that has been given, and which appears to me to be a sufficient answer, is, that, although it may be reasonably admitted that such was the case, and consequently that no specific agreement relating to potatoes by name could have taken place before the statutes of Elizabeth, still that such an agreement may have been made as to the class of tithe to which potatoes belong, as would include and govern the tithe of potatoes when they were afterwards introduced. As, for instance, supposing an agreement took place before the statute of Elizabeth, upon sufficient consideration, that all roots and vegetables grown in open fields, when cultivated by the plough, should go to the rector, and, when cultivated by the spade, should go to the vicar, such an agreement would be valid in law, and would clearly comprehend potatoes when they came into general use. The question therefore in the present case is, whether there was such a body of evidence laid before the jury at the trial, as to justify them in making the presumption which they have

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done upon the very question submitted to them for their consideration. There is undoubtedly evidence on both sides; and perhaps, if the verdict had gone the other way, we should not have interfered to disturb it; but undoubtedly there is so much evidence on the part of the rector as to bring this case within the general principle upon which the Court acts—viz. not to disturb a verdict, unless it sees clearly that the verdict is wrong.

That *some* variation had taken place, and some alteration been made in the terms of the original endowment, in the interval between the date of the deed of endowment and the passing of the restraining statutes, is evident. The *Valor Ecclesiasticus*, which was made in the 26 Henry 8 (1535), enumerates the various sources of profit to which the vicar of Kingston was entitled at the time of such value being taken; and, upon comparing them with the enumeration in the endowment, there is a considerable difference between the two. To advert to no other than two instances: the endowment gives to the vicar the tithe "Sylvaæ cæduæ;" the *Valor* omits it, and gives him the tithe "Boscorum"—the former titheable of common right, the latter by custom only: again, by the endowment, the vicar was endowed with the tithe of wool and lambs and skins in the chapels of Ditton, Molesey, and Shene; in the *Valor* there is no mention of any such tithe as due to the vicar in any part of the parish. *Some* alteration, therefore, though to what extent may be uncertain, must have taken place in the interval between the time of granting the original endowment and the time of taking the *Valor*.

But there is one provision in the endowment well worthy of observation—"That, if it should happen in future that any gardens of the said parish should be subverted or levelled, and that the land of the same should be cultivated by the plough, then that the said prior and convent should receive and take all the tithes of the blades of whatever gardens and lands were so ploughed." Again

—“That, if it should happen afterwards, that any plough lands (not being of the manors of the said prior and convent) should be reduced to gardens, and dug by the foot, then the said vicar should have and take the tithes of blade arising from such gardens during such times as they should be dug and cultivated by the foot.” The word “bladum” appears clearly by another part of the indowment to comprehend rye, wheat, and mislen. This provision seems to point to a distinction between the tithe of the same article when growing in fields under the plough, and when growing in gardens under the spade—that, in the first case, it should belong to the rector; in the second, to the vicar: and, when this is coupled with the reputation in the parish that the rector followed the plough and the vicar the spade, we think it furnishes a fair ground of support to the presumption which has been made by the jury in favour of the plaintiffs.

Lastly, it was proved that the tithe of potatoes is mentioned in the deeds by which the great tithes have been conveyed from one rector to another, so early at least as the year 1738; and that such tithe has been included in leases of the tithes, under which leases the rents reserved by the leases have been paid. This fact is evidence of enjoyment on the part of the rector, whilst there is a total absence of any such evidence on the part of the vicar.

Upon this state of evidence, we cannot think ourselves warranted in sending the cause down to a new trial. The learned judge has expressed no dissatisfaction with the verdict; and it cannot but be observed that this decision will not bind the vicar as to the rest of the parish, if he thinks proper to try his right as to other lands within the same.

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Rule discharged.

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Thursday,
June 12th.

The Court rescinded a rule for judgment on a false plea of nul tiel record to a scire facias, on the ground that four days had not been suffered to intervene between the delivery of the issue and the rule to produce the record.

Wood v. Frost.

THE plaintiff brought a scire facias on a judgment of this Court more than twenty years old. The declaration was delivered on the 2nd June; on the 10th the defendant pleaded nul tiel record; and on the 11th (yesterday) the issue was delivered, and Mr. *Butt*, on the part of the plaintiff, upon an affidavit that the plea was false and pleaded for the mere purpose of delay, obtained a rule (drawn up peremptorily to shew cause on the 12th) for judgment; and the officer was directed to produce on this day the record of the judgment in the original action. The Secondary having accordingly produced the record, Mr. *Butt* (no counsel appearing to shew cause) made his rule absolute.

Mr. *Comyn*, who had been instructed to oppose the rule for judgment, in the course of the day, moved that it might be rescinded, on the ground of irregularity in the proceedings.—He contended that the rule to produce the record should have been a four day rule after the delivery of the issue; and that, this being the case of a judgment on which the plaintiff had thought fit to sleep so long, the application was one that the Court would not be disposed to favour, in violation of the established practice.

Mr. *Butt*, contra, submitted that the constant practice, where a plea appears upon the face of it to be a sham plea and pleaded for the mere purpose of delaying the plaintiff, was, to permit judgment to be signed, treating the plea as a nullity; and that, in the present case, the falsity of the plea clearly appeared, as well from the affidavit upon which the original motion was founded, as from the record of the judgment that had been produced.

Lord Chief Justice TINDAL.—The practice of the Court requires that there shall be four days between the delivery of the issue and the production of the record. In the present case, four days have not intervened; and no reason has been suggested to induce the Court to depart in the particular case from the ordinary rule. The plaintiff might have brought his action earlier.

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The rest of the Court concurring—

Rule rescinded.

Doe d. Summerville v. Roe.

Thursday,
June 12th.

THE 11 Geo. 4 & 1 Will. 4, c. 70, s. 36—after reciting that landlords to whom a right of entry into or upon any lands or hereditaments might accrue during or immediately after Hilary and Trinity Terms respectively, were theretofore unable to prosecute ejectments against their tenants so as to try the same at the Assizes immediately ensuing, whereby much delay was occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords—enacts, “that, in all actions of ejectment thereafter to be brought in any of his Majesty’s Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire or the right of entry into or upon such lands or hereditaments shall accrue to such landlord *in or after* Hilary or Trinity Terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a declaration in ejectment intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice

The statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, for expediting the remedy of the landlord where his right of entry accrues during or immediately after an issuable term, does not apply to the case of a tenancy under an agreement expiring the day before the first day of the term.

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DOM
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thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within ten days in the Court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: Provided always that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the Assizes at which such ejectment is intended to be tried: provided also that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his Majesty's superior Courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next Assizes; and that it shall be lawful for the judge in his discretion to make such order in the said cause as to him shall seem expedient."

Mr. *Milner* moved for judgment against the casual ejector, in pursuance of the above provision, under the following circumstances:—The premises were demised to the tenant in possession by a written agreement dated the 21st of May, 1830, for one year, and so on from year to year, and the tenancy had been put an end to by a regular notice to quit. He submitted, that, as the year would only be completed on the 21st, the landlord's right of entry did not attach till the 22nd, the first day of the term, and consequently the case was within the act, which being remedial should be liberally construed.

PER CURIAM.—The construction contended for would be rather too liberal: the 20th was the last day of the tenancy.

Rule refused.

Regulae Generales.

TRINITY TERM, 4 WILL. IV.

FINES AND RECOVERIES.

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IT IS ORDERED that, from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment taken in pursuance of the late act of parliament respecting fines and recoveries as state "the deponent's knowledge of the party making the acknowledgment, and her being of full age," cannot be deposed to by a commissioner or by an attorney or solicitor, the same may be deposed to by some other person whom the person before whom the affidavit shall be made shall consider competent so to do.

Where part of the affidavit verifying the certificate of acknowledgment cannot be deposed to by a commissioner or attorney, &c.

AND IT IS FURTHER ORDERED, that, where more than one married woman shall at the same time acknowledge the same deed respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only; and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees; and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property. And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

Fees to be taken where more than one married woman acknowledge the same deed respecting the same property.

Where the same party at the same time acknowledges more than one deed respecting the same property.

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REG. GEN.
Acknowle-
gment of a lease
and release.

In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

MEMORANDUM.

THE JUDGES who sat in the Court of Common Pleas during the foregoing term were—

Lord Chief Justice TINDAL.
Mr. Justice PARK.
Mr. Justice GASELEE.
and
Mr. Justice BOSANQUET.

END OF TRINITY TERM.

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ACCOUNT STATED—*See ATTORNEY*, 3.

ACTION ON THE CASE—*See CASE*.

ADMINISTRATOR—*See EXECUTORS AND ADMINISTRATORS*—**STATUTE OF LIMITATIONS**, 3.

AFFIDAVIT.

To hold to Bail.

Form of.

1. In an action by husband and wife, administratrix, on a bond given to the intestate, it is no objection to the affidavit to hold to bail that the defendant is alleged to be indebted to *the husband and wife, administratrix*; or that the affidavit omit to state that the deceased died intestate, or to whom the sum mentioned in the condition is made payable—the same degree of precision not being required in an affidavit as in a declaration. *Coppin v. Potter*, 272.

2. Semblé that an affidavit to hold to bail by the indorsee of a bill of exchange need not state by whom the bill was indorsed to the plaintiff. *Mammatt v. Matthew*, 356.

3. An affidavit to hold to bail on a bill of exchange (by indorsee against acceptor) need not aver a presentment for payment. *Us borne v. Pennell*, 431.

Description of Deponent.

4. In an affidavit to hold to bail, the deponent was described as “J. S., of Bath, in the county of Somerset, Esq.”—Held, sufficient. *Coppin v. Potter*, 272.

Second Affidavit, where necessary.

5. A capias was issued against the defendant upon an affidavit sworn before and filed with the deputy filacer for Sussex. The defendant not being found in Sussex, the plaintiff caused an alias capias to be issued into Cornwall by *the same officer*, he being also deputy filacer for that county:—Held, that no new affidavit of the cause of action, or office copy of that already sworn, need be filed on issuing the alias. *Coppin v. Potter*, 272.

6. The 6th rule of Michaelmas Term, 3 Will. 4, does not prevent a plaintiff from issuing concurrent writs of capias into two or more counties; but there should be an affidavit of debt filed with the filacer of each county. *Dunne v. Harding*, 450.

On Motions and Rules.

7. Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained. *Barham v. Lee*, 327.

AGREEMENT—*See WRIT OF ERROR.*

An agreement was entered into between the plaintiffs (the solicitors under a commission of bankrupt issued against one W., which he was desirous of superseding) and the defendant (the solicitor of the bankrupt), whereby the

AGREEMENT—(Continued).

plaintiffs undertook to hold themselves liable to account to the defendant for any balance that might remain out of a sum received by them from a debtor to the estate, after satisfying their claim for costs and the claims of the accountant and messenger; and the defendant agreed, in the event of the sum so received by the plaintiffs proving inadequate to cover those claims, to pay the plaintiffs the difference:—Held, that, in the absence of an averment in the declaration that the commission against W. was superseded, or that the creditors consented to the above arrangement, there was no valid consideration for the defendant's promise. *Haslam v. Sherwood*, 434.

APPROPRIATION—See GOODS SOLD AND DELIVERED.**ARBITRATION.***Award, where final.*

A cause (the declaration in which contained eight counts) and all matters in difference between the plaintiff and defendant were referred; the costs of the cause, and of the reference and award relating thereto, to abide the event. The arbitrators found that the plaintiff had good cause of action in respect of the matters charged in five of the counts, and awarded 5*l.* damages, and directed that no further proceedings should be had in the cause; but made no specific award as to the three remaining counts:—Held, that the award was not final, there being no determination as to the three last-mentioned counts, and consequently no legal event as to them to authorize the taxation of costs thereon. *Norris v. Daniell*, 383.

ARREST—See PRACTICE.**ASSAULT AND BATTERY—See TRESPASS, 2.****ASSIGNEE—See BANKRUPT.****ASSIGNMENT.***Of Lease.*

A lessee for years under-demised for a term longer than the residue held by him, the underlessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.*, by quarterly payments:—Held, that the instrument amounted to an assignment, inasmuch as all the leasee's term was thereby conveyed. *Baker v. Gostling*, 539.

ATTORNEY—See AGREEMENT.*Certificate and Inrolment.*

1. The defendant paid the debt, and the plaintiff's attorney proceeded with the action to recover costs. The defendant resisted the action on the ground that the plaintiff's attorney was uncertified and therefore not entitled to sue for costs. A verdict having been entered for the plaintiff for nominal damages—the Court stayed the execution. *Meekin v. Whalley*, 494.

2. The inrolment of an attorney in the Common Pleas is thus effected:—The party, on receiving his admission from the Secondary, takes it to the clerk of the warrants, who thereupon enters his name and address in a book kept for that purpose in alphabetical order. Unless inrolled, it is not competent to an attorney to sue for any fees or disbursements: therefore, where the defendant's attorney (in every other respect duly qualified to act as an attorney) had omitted to cause his name to be inrolled as above, the defendant having made no advances on account of the expenses of the suit—The Court permitted the plaintiff to discontinue without paying costs. *Humphrys v. Harvey*, 500.

Bill of Costs.

3. In an action by an attorney for business done, for which no signed

ATTORNEY.*Bill of Costs—(Continued).*

bills had been delivered in pursuance of the statute, an admission by the defendant in an examination before the commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. *Eicke v. Nokes*, 585.

Lien for Costs.

4. The lien of an attorney cannot be affected by a reference of the cause and all matters in difference between the parties. *Cowell v. Betteley*, 265.

5. Two causes and all matters in difference between the respective parties were referred by an order of *Nisi Prius*, the costs to abide the event. The arbitrator directed a verdict to be entered for the plaintiff in the first cause, with 100*l.* damages, and for the defendant in the other. And he further found that the plaintiff was indebted to the defendant in the sum of 86*l.* 11*s.* 6*d.*, which sum together with the costs of the second action he directed should be set off against the damages and costs in the first:—Held, that the case was within the 93rd rule of Hilary Term, 2 Will. 4, and consequently that the set-off could not be allowed to the prejudice of the plaintiff's attorney's right of lien upon the damages and costs in the first action for his costs therein. *Ibid.*

*Liabilities of Attorneys.**Civilly.*

6. The plaintiff being the assignee of a term of years determinable as to one moiety on the death of A., and as to the other moiety on the death of B., employed the defendants as his attorneys on the assignment of his interest in the premises to one J. The defendants permitted the plaintiff on that occasion to execute an assignment containing an absolute and unqualified covenant for title, and a covenant for quiet enjoyment for the whole term if A. and B. should so long live, “without any lawful let, suit, hindrance, interruption, or denial of the plaintiff, his executors or administrators, or of any other person or persons whomsoever;” notwithstanding they were at the time aware that B., one of the cestuis que vie, had been dead some years, unknown to the assignee:—Held, that the defendants were bound to explain to the plaintiff the consequences that might result to him from entering into such covenants; and that the fact of the plaintiff himself being at the time aware of the death of B. afforded no answer to an action against them for negligence. *Stanard v. Ullithorne*, 359.

Criminally.

7. On a reference to the prothonotary of a rule for striking an attorney off the roll on a charge of having hired sham bail in error, the officer reported that the attorney did not actually hire the bail, but was aware that they were hired:—The Court discharged the rule on the terms of the attorney paying all the costs of and occasioned by the proceedings. *Dicas v. Warne*, 471.

AVOWRY—*See REPLEVIN.***AWARD—*See ARBITRATION.*****BAIL.***Payment into Court, in Lieu of.*

1. Where money has been paid into Court in lieu of bail, the plaintiff on moving to have it paid out to him is entitled to the costs of the application. *Freeman v. Paganini*, 165.

BAIL—(Continued).*Changing Bail,*

2. The 5th rule of Trinity Term, 1 Will. 4, which prohibits the changing of bail without leave of the Court or a Judge, applies to the case of bail put in by the sheriff for the purpose of rendering the defendant. *Rex v. The Sheriff of Essex*, 247.

Entering Exoneretur on Bail-Piece.

3. In November, 1831, the defendant, with the consent of his bail, gave the plaintiff a cognovit for the debt and costs, with a stay of execution until the 8th May, 1832. The defendant making default, a ca. sa. issued against him on the 10th May, which was returned non est inventus. No notice of the defendant's default, or of the ca. sa., was given to the bail. In December, 1833, the defendant died, and on the 7th January following the plaintiff wrote to the bail requiring payment of the debt and costs:—The Court permitted them to enter an exoneretur on the bail-piece. *Surman v. Bruce*, 184.

4. The defendant being arrested, applied to a Judge to be discharged, on the ground of a supposed defect in the affidavit to hold to bail. The application being dismissed, the defendant requested the plaintiff's attorney to consent to receive certain persons as bail without opposition. The latter consented upon the understanding that the decision of the Judge was acquiesced in:—Held, that the defendant had waived the objection to the affidavit, and could not afterwards apply to the Court to enter an exoneretur on the bail-piece. *Mammatt v. Mathew*, 356.

BANKRUPT.*Act of Bankruptcy.**Departing from Dwelling-house.*

1. Where a trader whose goods are under seizure quits his house, it is for the jury to say whether he departs with the bona fide intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors. *Batchelor v. Vyse*, 552.

Voluntary Assignment, in Contemplation of Bankruptcy.

2. M., a trader carrying on a banking establishment of some magnitude and an extensive linen manufactory in Scotland, and a bazaar in London, had in the year 1825 mortgaged the whole of his property. In June, 1831, a sum of 75,000*l.* having been called in, and M. being unable to pay it, he agreed to sell to the devisee of the mortgagee his interest in the linen manufactory for 104,000*l.*, receiving from him the difference in money. Certain of M.'s property being thus released from mortgage, his son, to whom he was indebted in a sum of 12,300*l.* for money advanced, and to whom he had given a bond, which the son on his marriage had assigned to trustees for the benefit of his wife, called upon his father and requested him to assign to his wife's trustees a certain house and furniture in part satisfaction of the bond debt. M. assented, and thereupon directed his solicitor to prepare the conveyance, which was executed on the 1st of July, 1831, but not inrolled, nor registered, or otherwise made public, for more than six months afterwards. The fact of the sale of his interest in the linen concern was also kept secret, unknown even to his own clerks; and the advertisement of the dissolution of the partnership therein between himself and his co-proprietor was at the request of M. deferred; he assigning as a reason for desiring it, first, that it might prejudice his interests in a borough for which he was member, and afterwards, that it might cause a run on his Scotch banks, which he was not prepared to meet; and when told, at the end of December, that the dissolution would be advertis-

BANKRUPT.*Act of Bankruptcy.**Voluntary Assignment—(Continued.)*

ed in the next Gazette, M. stopped payment. The stoppage took place on the 2nd of January, 1832, and a commission of bankrupt was issued against him on the 26th. At the time of making the assignment to his son, the state of his affairs (as appeared from accounts made out after his failure) was this:—The bazaar produced a profit of about 2,000*l.* a year; but, in the banking concern, there was a deficiency varying between the months of January and July, 1831, from 66,000*l.* to 76,000*l.* The debts proved under the commission amounted to 113,000*l.*, the available assets to 68,000*l.* In an examination upon interrogatories, M. stated that he did not contemplate bankruptcy when he executed the assignment, nor did he execute it with intent to defeat or delay his creditors; and that he was moved to it solely by the request of his son. In an action brought by the assignees of M. to recover the title deeds of the property thus assigned, on the ground that the assignment was voluntary and made in contemplation of bankruptcy, it was left to the jury to say—first, whether the assignment was spontaneous on the part of M., and made with a view to prefer his son, to the prejudice of the rest of his creditors—secondly, whether M. was in such a situation at the time that he must have known, or had reason to suppose, that bankruptcy was inevitable. The jury having found for the defendants—affirming the validity of the transfer—The Court refused to grant a new trial. Belcher v. Prittie, 295.

3. In such a case it is no ground for granting a new trial for misdirection, that the Judge expresses a strong opinion upon the facts either way; the whole being left to the discretion of the jury, and the question one peculiarly for their consideration. Ibid.

Petitioning Creditor's Debt.

4. Semble that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant founded on his demand for rent. Emery v. Mucklow, 263.

Rights of Assignees.

5. A sheriff who seizes the effects of a trader under a *f. fa.* issued after a secret act of bankruptcy, of which he had no knowledge, and sells them, is liable for the value of the goods so seized and sold, in an action of trover at the suit of the assignees appointed under a commission subsequently issued against such trader. Garland v. Carlisle, 24.

Staying Proceedings in Action against Bankrupt.

6. The plaintiff after being nonsuited took out a *fiat* in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 59th section of the 6 Geo. 4, c. 16. Eicke v. Nokes, 586.

Admissions by Bankrupt.

7. In an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant in an examination before the commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. Eicke v. Nokes, 585.

BARON AND FEMME.*Validity of Marriage.*

1. One F. on his death bequeathed to his widow certain rents, with a proviso that they should go over to his children in the event of her marrying again. The widow married one G. by banns, in which she was,

BARON AND FEMME.*Validity of Marriage—(Continued).*

for the purpose of concealing the fact of the marriage, described by her maiden name. In an action by the testator's daughter against the personal representatives of G., to recover the amount of rents received by him during the life of Mrs. F., and whilst she and G. cohabited as man and wife:—Held, that the forfeiture did not take place, the marriage being void; and that the defendants were not estopped from taking advantage of its invalidity. *Allen v. Wood*, 510.

Rights and Liabilities of Wife.

2. Motion under the 3 & 4 Will. 4, c. 74, s. 91, to dispense with the concurrence of the husband to a disposition by the wife of lands, &c., to which the latter is entitled in her own right. *Ex parte Thomas*, 331—*Ex parte Shuttleworth*, 332, n.

3. To a plea of coverture, the plaintiff replied that the husband was an alien, that, at the time of the contracts, he resided beyond seas, that the defendant lived in this kingdom separate and apart from him as a femme sole, and that she made the contracts declared on as such femme sole:—Held, no answer to the plea, it not appearing that the absence of the husband was permanent. *Stretton v. Busnach*, 678.

BENEFICED CLERGYMAN—See CLERGYMAN.**BILL OF EXCEPTIONS—See EXCEPTIONS.****BILLS OF EXCHANGE AND PROMISSORY NOTES.***Inland.*

1. In an action on a bill of exchange (by drawer against acceptor), in order to rebut the presumption arising from the plaintiff's possession of the bill, that he was the holder, the defendant offered in evidence a draft of a declaration delivered in the year 1829, in an action on a bill of exchange of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of a bankrupt:—Held, insufficient to call upon the plaintiff to shew how he became re-possessed of the bill in his individual character. *Dabbs v. Humphrey*, 285. ◆

Foreign.

2. Where a promissory note was made by the defendant in France, and indorsed in blank by the payee in that country, the maker and payee both at the times of making and indorsing the note being domiciled there:—Held, that, as no action could have been maintained upon the note in the French Courts of law in the name of the indorsee, such indorsement according to the law of France operating as a procuration only, and not as a transfer, so no action could be maintained by him in our Courts. *Trimbey v. Vignier*, 695.

BREWER—See COVENANT.**CASE.**

In an action against the sheriff of Surrey and the keeper of the county prison for causing a debtor to be confined in a cell on the felons' side of the goal, it appeared that the defendants had so done in consequence of an anonymous communication said to have been made to one of the turnkeys, that the plaintiff meditated an escape; and that the matter had been made known to the visiting magistrates, who declined to interfere: but it did not appear that any investigation had been made as to the source whence the information was obtained:—Held, that there was no sufficient proof of reasonable or probable cause on the part of the defendants to justify the course they adopted. *Furnival v. Stringer*, 582.

CHARTERPARTY—*See SHIPPING.*

CLERGYMAN.

Charging Benefice.

Where a beneficed clergyman enters into an agreement to permit the profits of his living to be received by a third person for the purpose of the surplus (after payment of a competent stipend to a curate to serve the church) being applied in liquidation of his debts:—Held, a charge upon the living, and void by the 13 Eliz. c. 20. *Alchin v. Hopkins*, 615.

COLLOQUIUM—*See SLANDER.*

COPARCENERS.

An action will not lie at the suit of one of three co-parceners to recover his proportion of rents of the estate received by an agent. *Decharms v. Horwood*, 400.

COSTS.

Taxation of.

1. The plaintiff obtained a Judge's order, with the usual undertaking, for the taxation of a bill of costs due from her son to the defendant:—Held, that it was not competent to her afterwards to bring an action against the defendant to recover back the money paid by her in pursuance of that order, in the absence of proof of fraud or misrepresentation by the defendant. The Court, therefore, stayed the proceedings. *Kendall v. Allen*, 319.

Where Attorney unqualified.

2. The defendant paid the debt, and the plaintiff's attorney proceeded with the action to recover costs. The defendant resisted the action on the ground that the plaintiff's attorney was uncertified and therefore not entitled to sue for costs. A verdict having been entered for the plaintiff for nominal damages—the Court stayed the execution. *Meekin v. Whalley*, 494.

3. Where the defendant's attorney (in every other respect duly qualified to act as an attorney) had omitted to cause his name to be enrolled, the defendant having made no advances on account of the expenses of the suit—The Court permitted the plaintiff to discontinue without paying costs. *Humphrys v. Harvey*, 500.

Where one Defendant suffers Judgment by Default, and others obtain Verdict.

4. In an action on the case in the nature of waste brought against eighteen defendants, one of them suffered judgment by default, and at the trial a verdict was found for all the others—Held, that they were entitled to their costs, under the 4 Jac. 1, c. 3. *Price v. Harris*, 474.

In real Actions.

5. The tenant in a writ of intrusion is not entitled to costs upon a nolle prosequi. The statute 8 Eliz. c. 2, is confined to personal actions. *Williams, dem., Harris, ten.*, 491.

Incidental.

6. The costs of a motion by a female defendant to be discharged out of custody on the ground of coverture, or that she has been arrested by a wrong name, are not costs in the cause, and therefore not taxable on a discontinuance of the action. *Mummery v. Campbell*, 379.

Under the 43 Geo. 3, c. 46, s. 3.

7. The plaintiff held the defendant to bail for 27*l.*, and at the trial recovered 10*l.* only, his demand having been reduced by a set-off claimed by the defendant for goods sold to the plaintiff:—Held, that the defendant was entitled to his costs under the statute, although the set-off was disputed at the trial on the alleged ground that the goods were not according to order. *Sims v. Jaquest*, 380.

COSTS—(Continued).

Liability of Executors and Administrators to.
See EXECUTORS AND ADMINISTRATORS, 5.
And see REGULE GENERALES.

COVENANT.*For Payment of Rent.*

1. A lessee for years under-demised for a term longer than the residue held by him, the underlessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.*, by quarterly payments:—Held, that notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, covenant lay at the suit of the executors of the lessee, to recover arrears of the rent accruing during the continuance of the lessee's term. *Baker v. Goostling*, 539.

And See EXECUTORS AND ADMINISTRATORS.

Prohibited Trades.

2. The plaintiffs, lessees of premises under a demise with a covenant not to suffer certain trades to be carried on therein, amongst others those of a "common brewer" or "retailer of beer," without the license of the lessor, underleased to the defendant, who covenanted in like manner not to carry on the prohibited trades, without the license of the plaintiffs. The defendant (under a license from the plaintiffs) carried on the business of a "retail brewer" on the demised premises; whereupon the superior landlord brought an ejectment for the supposed forfeiture, which not being defended, he obtained possession:—Semble, that this recovery in the ejectment by the superior landlord was no answer on the part of the defendant to a demand for rent by his lessors—a "retail brewer" not being within the proviso in the original lease. *Simons v. Farren*, 672.

To repair.

See EXECUTORS AND ADMINISTRATORS, 3.

COVERTURE—See BARON AND FEMME, 3.**DECLARATION—See PLEADING, 1, 5.****DEFAMATION—See SLANDER.****DEPOSIT—See VENDOR AND PURCHASER.****DEVISE.***Construction of.*

W. K. being seised of a freehold farm and estate in his own occupation, by his will gave and bequeathed to his two brothers all his goods chattels, *estate*, and effects, of what nature or quality soever, and wheresoever (not thereby otherwise disposed of), upon trust, first, that all the testator's debts should be paid and satisfied, and that whatsoever remained after such discharge, of his personal effects, should be appropriated to the use of his family; secondly, that testator's family should be placed in the farm until his youngest son should attain the age of twenty-one; and lastly, that, on his attaining that age, the estate should be sold, and the produce divided among the testator's family; and he appointed his brothers his executors. The testator being seised of a freehold estate, independently of the farm he occupied, and his personal effects being insufficient to satisfy his debts:—Held, that his executors were entitled to sell such freehold estate for the payment of his debts. *King v. Shrives*, 149.

DILAPIDATIONS—See EXECUTORS AND ADMINISTRATORS, 3.**DISCONTINUANCE—See Costs, 3.****DISTRESS—See POOR-RATE.**

ECCLESIASTICAL LAW.*Avoidance of Living.*

The patron of a benefice with cure of souls under the value of *8l.* in the king's books, being also incumbent of the same benefice, accepted another with cure, and thereupon presented a clerk to the proper ordinary, who was afterwards admitted, instituted, and inducted, on his presentation, to the former living:—Held, that the first beneficent hereby became *actually void* from the time of presentation, within the meaning and provisions of the statute 28 Hen. 8, c. 11, and the succeeding incumbent entitled to the tithes from such presentation. *Betham v. Gregg*, 230.

Charging Living.

See CLERGYMAN.

EJECTMENT.*Service of Declaration.*

1. A declaration and notice in ejectment were served upon a servant of the tenant, whose wife subsequently admitted that she had received it and had given it to her husband:—Held, insufficient. *Doe d. Tucker v. Roe*, 165.

2. Service of declaration in ejectment on the daughter of the tenant in possession is not good service, unless it be shewn to have come to the hands of the tenant. *Doe d. Brittlebank v. Roe*, 562.

Motion for Judgment.

3. The rule of this Court of Trinity, 32 Car. 2, requiring motions for judgment against the casual ejector, in Middlesex and London, to be made in one week after the first day of Michaelmas and Easter Terms, and within the first four days of Hilary and Trinity Terms, is still in force. *Doe d. Lawford v. Roe*, 681.

4. The statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, for expediting the remedy of the landlord where his right of entry accrues *during or immediately after* an issueable term, does not apply to the case of a tenancy under an agreement expiring the day before the first day of the term. *Doe d. Summerville v. Roe*, 747.

ERROR, WRIT OF—*See WRIT OF ERROR.***ESTOPPEL—*See BARON AND FEMME, 1—LANDLORD AND TENANT, 4, 5.*****EVIDENCE.***Admissions.*

1. In an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant in an examination before the commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. *Eicke v. Nokes*, 585.

Of Title of Plaintiff.

2. In an action on a bill of exchange (by drawer against acceptor), in order to rebut the presumption arising from the plaintiff's possession of the bill, that he was the *holder*, the defendant offered in evidence a draft of a declaration delivered in the year 1829 in an action on a bill of exchange of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of a bankrupt:—Held, insufficient to call upon the plaintiff to shew how he became re-possessed of the bill in his individual character. *Dabbs v. Humphrey*, 285.

Proof of Acts of Parliament declared Public.

3. An act for the regulation of the affairs of an Insurance Company contained a clause directing that it should be deemed and taken to be a

EVIDENCE.*Proof of Acts of Parliament declared Public—(Continued).*

public act, and should be judicially taken notice of as such by all Judges, justices, and others, without being specially pleaded:—Held, that the act was sufficiently proved for all legal purposes, by the production of a copy purchased at the office of the king's printer. *Beaumont v. Mountain*, 177.

Secondary Evidence.

4. The plaintiff had been employed as secretary to a charitable institution. His appointment was made in pursuance of a resolution of the committee for managing the affairs of the society, which was entered in a book remaining in the hands of the plaintiff as secretary; but to which entry the plaintiff was no party, nor did it appear to have been expressly brought to his notice. The society dissolving, the plaintiff quitted the employ, leaving this book in the office. In an action against three of the committee for arrears of salary:—Held, that the plaintiff was bound to produce the book, inasmuch as it would shew the terms on which he had been engaged; and that a notice to the defendants to produce it, was not sufficient to entitle him to give secondary evidence under the quantum meruit—the book appearing not to be in the possession of the defendants, but in that of another member of the committee, without the knowledge or control of the defendants. *Whitford v. Tutin*, 166.

EXCEPTIONS.

Where exceptions are not properly taken—as, where they appear upon the record after the finding of the jury—the Court of error cannot give judgment thereon. *Armstrong v. Lewis*, 1.

EXECUTORS AND ADMINISTRATORS.*Rights and Liabilities of.*

1. Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate. *Orme v. Broughton*, 417.

2. A lessee for years under-demised for a term longer than the residue held by him, the underlessee covenanting to pay to the lessee, his executors and administrators the yearly sum of 75*l.*, by quarterly payments:—Held, that, notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, covenant lay at the suit of the executor of the lessee, to recover arrears of the rent accruing during the continuance of the lessee's term. *Baker v. Gostling*, 539.

3. An executor who has occupied premises held by his testator under a lease with covenants for payment of rent and taxes and to keep the premises in repair, sued in covenant as assignee, in respect of the privity of estate, is liable on the covenant for payment of rent and taxes to the extent only of the profits: but, for a breach of the covenant to repair, he is liable to the same extent that any other assignee is liable. *Tremeere v. Morrisén*, 603.

4. Quære, whether there is any distinction in this respect between the case of an executor and that of an administrator. *Ibid.*

Liability to Costs under the 3 & 4 Will. 4, c. 42, s. 31.

5. The 31st section of the 3 & 4 Will. 4, c. 42, renders executors or administrators suing in right of the testator or intestate liable to costs where they are nonsuited or the defendants obtain verdicts, unless the Court or a Judge shall otherwise order:—Semblé that the Court will otherwise order where there appears to be reasonable or probable cause for suing in the representative character. *Lysons v. Barrow*, 463.

EXECUTORS AND ADMINISTRATORS.*Liability to Costs &c.—(Continued).*

6. The defendant effected a policy of insurance on the life and for the benefit of one G., and, on his death, received the sum insured. The plaintiffs, as executors of G., sought to recover this sum in an action for money had and received by the defendant to their use as executors, and were nonsuited on a ground collateral to the merits of the cause:—The Court ordered the judgment of nonsuit to be entered up without costs, under the statute. *Ibid.*

EXECUTORY CONTRACT.*On a Sale of Goods.*

1. Where a contract that is silent as to price is *executed* by the acceptance of the goods by the defendant, the law will supply the want of an agreement as to price, by inferring that the parties must have intended a reasonable price:—but, quære whether the same inference arises where the contract is *executory* only, and the goods still remain in the possession or under the control of the seller? *Acebal v. Levy*, 217.

2. In all cases of executory contracts for the purchase and sale of goods, where the parties are silent as to price, the law will supply the want of an agreement as to price, by inferring that the parties intended to sell and to buy at a reasonable price. *Hoadly v. Maclaine*, 340.

FALSE IMPRISONMENT—*See PLEADING*, 4.**FEMME COVERTE**—*See BARON AND FEMME.***FINES AND RECOVERIES.***Reversing Fine.*

Where the acknowledgment of a party to a fine was taken before commissioners who were aware of the fact of her being a married woman, and of the non-concurrence of her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property—The Court refused to reverse the fine, at the instance of the husband, but left him to his common law remedy. *Cheek, plaintiff; Booth, defendant*, 460.

FOREIGNER—*See PLEADING*, 8.**FOREIGN LAW.**

1. The rule applicable to contracts made in one country and put in suit in the Courts of law of another, is this—that the interpretation of the contract must be governed by the law of the country where the contract was made, and the mode of suing, and the time within which the action must be brought, by the law of the country in which it is sought to be enforced. *Trimbey v. Vignier*, 695.

2. Therefore, where a promissory note was made by the defendant in France, and indorsed in blank by the payee in that country, the maker and payee both at the times of making and indorsing the note being domiciled there:—Held, that, as no action could have been maintained upon the note in the French Courts of law in the name of the indorsee, such indorsement according to the law of France operating as a procreation only, and not as a transfer, so no action could be maintained by him in our Courts. *Ibid.*

FORFEITURE—*See COVENANT*, 2.—**BARON AND FEMME**, 1.**FRAUDS, STATUTE OF**—*See STATUTE OF FRAUDS.***FRAUDULENT CONVEYANCE**—*See BANKRUPT*, 2.**FRENCH LAW**—*See FOREIGN LAW.*

GOODS BARGAINED AND SOLD.

Quære whether the vendor of goods is precluded from maintaining a count for goods bargained and sold, where the goods have been re-sold by him on the vendor's refusal to accept them? *Acebal v. Levy*, 217.

And see—EXECUTORY CONTRACT.

GOODS SOLD AND DELIVERED.

The plaintiff was employed by the defendant to make a machine for him according to a particular plan, receiving a payment on account, but no specific price being agreed on. When the machine was completed, the defendant saw and approved of it, but objected to the price demanded for it. The defendant afterwards requested the plaintiff to send it home before it was paid for; which the latter refused to do. On being applied to for the amount by the plaintiff's attorney, the defendant said he would endeavour to arrange it if the plaintiff would give him time:—Held, a sufficient appropriation of the machine by the plaintiff, and assent thereto on the part of the defendant, to entitle the former to recover the value on a count for goods bargained and sold. *Elliott v. Pybus*, 389.

And see—EXECUTORY CONTRACT, 1.

GUARANTIE—*See STATUTE OF FRAUDS*, 2, 3.**HEIR.**

Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate. *Orme v. Broughton*, 417.

HIGHWAYS—*See TOLLS.***HUSBAND AND WIFE—*See BARON AND FEMME.*****IMPRISONMENT—*See PLEADING, 4.*****INFANT.**

Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the Court will order it to be vacated as against the latter, and to stand as against the other parties. *Ashlin v. Langton*, 719.

INFERIOR COURT.

Practice on motions for new trials in the sheriff's court. 484.

INNUENDO—*See SLANDER.***INROLMENT—*See ATTORNEY, 1, 2.*****INTEREST—*See PLEADING, 2.*****INTERPLEADER—*See PRACTICE, 8.*****INTRUSION, WRIT OF—*See WRIT OF INTRUSION.*****INVESTIGATION OF TITLE—*See VENDOR AND PURCHASER.*****IRREGULARITY—*See PRACTICE, 11—17.*****JUDGE'S ORDER.**

A rule absolute may be drawn up during term on an order of a Judge dated in vacation. *Swaine v. Stone*, 584.

JURORS.

Persons exempt from serving as.

All deputies and officers employed by the Postmaster-General are, by

JURORS.

Persons exempt from serving as—(Continued).

the letters patent under which the Postmaster-General is appointed and the 2nd section of the statute 6 Geo. 4, c. 50, exempted from serving on juries. *Ex parte Atkinson*, 160.

JUSTICE OF PEACE—See MAGISTRATE.**JUSTIFICATION—See LIBEL.****LANDLORD AND TENANT.**

Rights and Liabilities.

1. Semble, that, pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant founded on his demand for rent. *Emery v. Mucklow*, 263.

2. In an action on the case on the statute 11 Geo. 2, c. 19, for an irregular distress, the declaration stated that the rent in respect of which the distress was made was due under a demise from A. and B.: the proof was of a demise by T.:—Held, a fatal variance, this allegation being of the foundation of the action. *Ireland v. Johnston*, 706.

3. The defendant hired of the plaintiff for one year a house situate in Scotland, together with the furniture therein. An inventory of the furniture was made out and signed by both parties. At the bottom of this inventory was a memorandum by which the defendant engaged to redeliver to the plaintiff at the end of the tenancy the articles enumerated. During the tenancy, one of the defendant's servants, finding that one of the chimnies smoked, set light to some furze and straw therein, in consequence of which the house was consumed, with a portion of the furniture. In an action brought by the plaintiff to recover compensation for the loss, an advocate who was called to prove what was the law of Scotland on the subject, stated, that, by the common law of Scotland, if a house was burned down through the negligence of a servant of the tenant whilst in the performance of an act that is within the ordinary scope of the servant's duty, the tenant is liable to the landlord for the loss so occasioned; otherwise not: and that, if furniture be let with a house, it is the same thing whether there be a special contract to restore it or not; for that no special contract is necessary in order to compel him to redeliver it at the end of the tenancy. The learned Judge who tried the cause, told the jury, that, if they thought that the injury complained of was the result of an unauthorized act, an act not falling within the scope of the servant's duty, the defendant was not liable, either in respect of the house or the furniture. The jury having found a verdict for the defendant—The Court refused to grant a new trial. *M'Kenzie v. M'Leod*, 249.

Tenant disputing Landlord's Title.

4. The defendant entered into possession of premises under an agreement dated the 31st March, 1832, and made with T. F. and W. B. J. B., "acting for and on behalf of the trustees of the joint estate of T. B. and S. B." In an action for use and occupation brought by the five persons who (as proved by parol evidence at the trial) were, at the date of the agreement, "trustees of the joint estate of T. B. and S. B.", and, for whom T. F. and W. B. J. B. were then acting as agents, the plaintiffs gave in evidence two orders in Chancery, dated in 1830 and 1831, by the former of which two of the plaintiffs were named as trustees of T. B., and, by the latter, the other three as trustees of S. B.:—Held, that the action was well brought in the names of the five; and that, notwithstanding the orders produced, the defendant was estopped from disputing the title of those under whom he, by executing the agreement, acknowledged to hold the premises, for that the title evidenced by those orders was not inconsistent with a different title in the plaintiffs at the date of the agreement. *Fleming v. Gooding*, 455.

LANDLORD AND TENANT.

Tenant disputing Landlord's Title—(Continued).

5. P., N., and the plaintiff occupied successively premises under a lease that had been granted in 1809, by parties having no right to make a lease. The defendant in 1827 became possessed of the fee. In the years 1829 and 1831 respectively, the defendant distrained on P. and N. for arrears of rent, which they paid:—Held, that these payments amounted to such an acquiescence by P. and N. in the title of the defendant, that they and those deriving possession from or under them were estopped from disputing it; and this although the defendant himself produced in evidence the lease of 1809, and failed to shew that it had been assigned to him. *Cooper v. Blandy*, 562.

LIBEL.

The defendant, in publishing what professed to be an account of proceedings under a commission of lunacy, on which the plaintiff had been examined as a witness to prove the insanity of the party, made statements reflecting on the testimony of the plaintiff, but without setting out his evidence; and concluded with saying—"Mr. Jervis made a splendid speech of two hours' duration in favour of Mr. W.'s sanity, and commented with cutting severity on the testimony of Mr. R. (the plaintiff)":—Held, that the whole publication taken together was libellous, inasmuch as it is insinuated a charge of perjury against the plaintiff; and that a plea justifying the concluding sentence only, was ill on demurrer. *Roberts v. Brown*, 407.

LIMITATION OF ACTIONS—*See STATUTE OF LIMITATIONS.***MAGISTRATE.**

Notice of Action against.

A magistrate is not entitled to notice of action under the 24 Geo. 2, c. 44, s. 1, for a trespass committed by him, where from the circumstances the jury think he was not acting bona fide under an impression that what he did was within the scope of his duty as a magistrate. *James v. Saunders*, 316.

MASTER AND SERVANT.

Liability of Master for Acts of his Servant.

See LANDLORD AND TENANT, 3.

MEMORANDA.

Practice on motions from the sheriff's court, 484.

Promotions, &c., 330, 485, 486, 750.

Warrant for allowing barristers to practice in the Court of Common Pleas in banc, 483.

MISDIRECTION—*See NEW TRIAL.***MONEY HAD AND RECEIVED.**

Where maintainable.

An action for money had and received will not lie at the suit of one of three coparceners to recover his proportion of rents of the estate received by an agent, by whom the rents are claimed under a supposed demise to himself—Semble. *Decharms v. Horwood*, 400.

MONEY PAID INTO COURT—*See PRACTICE*, 5, 6.**NEGLIGENCE—*See ATTORNEY*, 6.****NEW TRIAL.**

In an action brought by the assignees of a bankrupt to recover property alleged to have been voluntarily assigned to the defendant by the bankrupt in contemplation of bankruptcy—it is no ground for granting a new trial for

NEW TRIAL—(Continued.)

misdirection, that the Judge expresses a strong opinion upon the facts either way; the whole being left to the discretion of the jury, and the question one peculiarly for their consideration. *Belcher v. Prittie*, 295.

NOLLE PROSEQUI.*In Real Actions.*

1. Practice as to the entry of a nolle prosequi by the defendant in a writ of intrusion. *Williams, dem., Harris, ten.* 358.
2. The tenant in a writ of intrusion is not entitled to costs upon a nolle prosequi. The statute 8 Eliz. c. 2, is confined to personal actions. *Ibid.*

To Part of a Count.

A declaration for a penalty (consisting of one count only) concluded "to the damage of the plaintiff of 100l." The defendant demurred specially, assigning for causes this and another ground. The plaintiff entered a nolle prosequi as to the damages. A Judge at Chambers ordered the nolle prosequi to be set aside:—The Court supported the order. *Butler v. Mapp*, 258.

NOTICE.*Of Action.*

A magistrate is not entitled to notice of action under the 24 Geo. 2, c. 44, s. 1, for a trespass committed by him, where from the circumstances the jury think he was not acting bona fide under an impression that what he did was within the scope of his duty as a magistrate. *James v. Saunders*, 316.

To produce.

See EVIDENCE, 4.

PARCENERS.

An action will not lie at the suit of one of three co-parceners to recover his proportion of rents of the estate received by an agent. *Decharms v. Horwood*, 400.

PARSON—*See CLERGYMAN.***PARTNER—*See SHIP-OWNERS.***

A contract made between two or more persons to enter into a partnership in contravention of the law, is void, and confers no rights upon either party. *Armstrong v. Lewis*, 1.

2. A. and B. carried on the business of a pawnbroker in partnership under a deed. The business was conducted solely by A., and his name alone appeared over the shop door and upon the printed tickets and duplicates used by persons in that trade, and the license contained the name of A. only:—Semble, that, although the parties might by this contract have rendered themselves liable to penalties imposed by the statute 39 & 40 Geo. 3, c. 99, yet that, there being no actual agreement for an infraction of the law, the contract was not void. *Ibid.*

PATENT.

1. A patent was granted to the plaintiff for certain machinery in the year 1824. In March, 1832, the Vice Chancellor made an order for the trial of the plaintiff's right in an action in this court. A verdict in that action being found for the plaintiff, and a rule nisi having been granted for entering a nonsuit or for a new trial, on the ground of the supposed invalidity of the patent by reason of an insufficient specification, and that rule being ready for argument, the defendant obtained a scire facias to repeal the patent. The court refused to postpone the discussion upon the rule, until after the decision

PATENT—(Continued.)

of the court of King's Bench upon the scire facias. Haworth v. Hardcastle, 448.

2. The plaintiff obtained a patent for machinery adapted to facilitate the drying of calicoes, &c. The specification, after describing the mode of hanging out the cloth for the purpose of drying it, also stated that it might be taken up again when dry by a contrary motion of the machinery. In an action for an invasion of the patent, the jury found "that the invention was new, and useful upon the whole, and that the specification was sufficient for a mechanic properly instructed to make a machine, and that there had been an infringement of the patent; but they also found that the machine was not useful in *some cases* for taking up goods:—The court refused to set aside a verdict entered for the plaintiff on this finding. Haworth v. Hardcastle, 720.

PAWNBROKER—See **PARTNER**.

PAYMENT INTO COURT—See **PRACTICE**.

PLEADING.*Declarations.*

1. An agreement was entered into between the plaintiffs (the solicitors under a commission of bankruptcy issued against one W., which he was desirous of superseding) and the defendant (the solicitor of the bankrupt), whereby the plaintiffs undertook to hold themselves liable to account to the defendant for any balance that might remain out of a sum received by them from a debtor to the estate, after satisfying their claim for costs and the claims of the accountant and messenger; and the defendant agreed, in the event of the sum so received by the plaintiffs proving inadequate to cover those claims, to pay the plaintiffs the difference:—Held, that, in the absence of an averment in the declaration that the commission against W. was superseded, or that the creditors consented to the above arrangement, there was no valid consideration for the defendant's promise. Haslam v. Sherwood, 434.

2. The declaration stated, that, by a certain indenture of mortgage, it was witnessed, that, in consideration of the sum of 1400*l.* then due to the plaintiffs from the defendants, the latter conveyed certain premises to the former, subject to a proviso, that, if the defendants should pay or cause to be paid to the plaintiffs the said sum of 1400*l.* on the 19th March, 1833, the plaintiffs should re-convey the premises to the defendants; and the defendants covenanted that they would pay to the plaintiffs *the said sum of 1400*l.* at the time and in the manner thereinbefore appointed for payment of the same*: Breach, nonpayment of the 1400*l.*, and interest, at the time and in the manner in the indenture appointed for payment of the same:—Held, a sufficient allegation of the day of payment; and that the claim for interest in the breach, none being reserved by the indenture, did not vitiate the declaration, but might be struck out. Til-dasley v. Stephenson, 442.

3. Declaration in trespass commencing "A. B. and C. D. complains," &c., and stating that the defendant was summoned to answer the plaintiff—not demurrable. Lyng v. Sutton, 417.

4. Declaration charged the defendants with having assaulted the plaintiff, seized and laid hold of him, pulled and dragged him about, struck him, and forced him from and out of a certain field into and through a pond, and imprisoned him. The plea justified all but the dragging the plaintiff through the pond:—Held, no answer to the action, the matter not covered by the plea being a distinct and substantive act of trespass. Bush v. Parker, 588.

5. In trespass for breaking and entering the plaintiff's apartment, and beating him, the venue was laid in Middlesex, and the declaration

PLEADING.*Declarations—(Continued.)*

charged the defendant with entering “a certain apartment of the plaintiff's in and parcel of a certain dwelling-house situate and being in London.” A demurrer, assigning for cause that the action was local and the venue laid in Middlesex, though the offence was alleged to have been committed in London:—Held ill. *Smith v. Smyth*, 180.

Pleas.

6. *Nil habuit in tenementis* cannot be pleaded to a count for use and occupation, either in *assumpsit* or debt. *Curtis v. Spitty*, 554.

7. The defendant in publishing what professed to be an account of proceedings under a commission of lunacy, on which the plaintiff had been examined as a witness to prove the insanity of the party, made statements reflecting on the testimony of the plaintiff, but without setting out his evidence; and concluded with saying—“Mr. Jervis made a splendid speech of two hours' duration in favour of Mr. W.'s sanity, and commented with cutting severity on the testimony of Mr. R. (the plaintiff):—Held, that a plea justifying the concluding sentence only, was ill on demurrer. *Roberts v. Brown*, 407.

Replications.

8. To a plea of *coverture*, the plaintiff replied that the husband was an alien, that, at the time of the contracts, he resided beyond seas, that the defendant lived in this kingdom separate and apart from him as a *feme sole*, and that she made the contracts declared on as such *feme sole*:—Held, no answer to the plea, it not appearing that the absence of the husband was permanent. *Stretton v. Busnach*, 678.

POOR RATE.

On a distress for arrears of a poor rate under the 50 Geo. 3, c. xlvi, s. 3:—Held, that, although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it; and that one shilling is a reasonable sum in that behalf. *Clarke v. Pedley*, 321.

POST HORSE DUTY.

By the 6 Geo. 4, c. 62, s. 2, a duty of one fifth part of the sum charged to the hirer, or 1s. 9d. for each horse, is payable on a letting to hire to go no greater distance than eight miles from the place of letting. By the 8th section the commissioners of stamps are directed to deliver to every postmaster printed forms, which the latter is by s. 30 required to return weekly filled up with, amongst other things, the amount of the sum charged for the hire, and the number of horses let for hire—” and shall be answerable and accountable for one fifth part of such sum of money so charged, or for the sum of 1s. 9d. for each horse so let for hire; and shall enter such one fifth part of such sum charged or the sum of 1s. 9d. for each horse, as and for the duty payable in respect of any horse so let for hire.” By s. 12, the postmaster is required to give bonds in a penalty for rendering true accounts; and by ss. 33 and 34, the farmer of the duty is authorized to require him to verify his account on oath before a magistrate. The defendant, a postmaster, in his weekly return inserted the sum of 2s. 6d. as the duty payable for two horses hired for a distance of five miles, without stating the sum charged for the hire:—Held, that he had an election to charge himself either with the duty of 1s. 9d. per horse or one fifth of the hire; and that, by the non-insertion of the fixed duty in the return, he had sufficiently declared his election to be charged with a fifth of the hire, and (no fraud being suggested) was not, by reason of his omission to insert in the return the amount of the hire, chargeable with the duty of 1s. 9d. per horse. *Hammond v. Hooley*, 664.

POST-OFFICE.

Officers of exempt from serving on Juries.

All deputies and officers employed by the Postmaster-General are, by the letters patent under which the Postmaster-General is appointed and the 2nd section of the statute 6 Geo. 4, c. 50, exempted from serving on juries. *Ex parte Atkinson*, 160.

POWER.

Execution of.

By a marriage settlement made in 1811, three several terms of 99 years, 500 years, and 600 years, were vested in three several sets of trustees; the first term for securing a jointure of 200*l.* per annum to the intended wife, the second for raising 5,000*l.* for the children of the marriage, the third for raising 2,000*l.* to be applied as the intended wife should direct; and a power was reserved to the settlor, with the consent and approbation of the respective trustees of the several terms of 99 years, 500 years, and 600 years, to substitute other lands of competent value for the lands charged with those several terms, whereupon it was provided that the premises originally charged should be wholly released and exonerated, and the said several terms, or such of them whereof the trusts should become unnecessary, should, so far as concerned the premises so to be discharged, cease, determine, and be absolutely void. By deeds of lease and release made in 1814, the settlor conveyed to the trustees named in the deed of 1811 certain lands in lieu and substitution for those charged with the above-mentioned terms. In this deed all the trustees were named as parties; but it was executed only by the settlor, by the trustees of the 99 years' term, and by one of the trustees of the 500 years' term: the other trustee of the latter term afterwards *orally* consented to the substitution; but the trustees of the 600 years' term never did consent:—Held, that, by the deed of 1814, the lands charged by the deed of 1811 were discharged from the annuity of 200*l.* per annum, and from the term of 99 years; but not from the other two sums, or the terms created for securing them—the nature and object of the power and the circumstances of the case pointing to a *previous* consent, and therefore such previous consent being necessary, although not required by the terms of the power; inasmuch as the consent to the proposed substitution implied an exercise of judgment on the part of those who were to give it, which judgment ought to have been formed on the state of circumstances as they existed at the time the substitution was made:—Held also, that, the deed of 1814 being expressly declared to be executed in pursuance and exercise of the power reserved in the deed of 1811, and the uses being declared to be those contained in the last-mentioned deed, the uses declared by the release of 1814 were not executed by the statute in the releases to uses except so far only as that deed operated as a valid discharge of the premises mentioned in the former deed from the charges thereby created—that is, only in so far as the power was well executed. *Greenham v. Gibbeson*, 198.

PRACTICE—See BAIL—REGULE GENERALES—WARRANT OF ATTORNEY.

Process.

1. It is no ground for setting aside a writ of capias, that the praesipe omits to state the amount of the debt sworn to. *Usborne v. Pennell*, 431.

2. The defendant was detained on a pluries capias having a blank for his place of residence, after a capias and alias describing him as of C. Street:—The writ and proceedings were set aside, although it was sworn that the defendant had quitted C. Street, and had no known place of residence. *Roberts v. Wedderburne*, 488.

3. The 6th rule of Michaelmas Term, 3 Will. 4, does not prevent a

PRACTICE.*Process—(Continued.)*

plaintiff from issuing concurrent writ of capias into two or more counties; but there should be an affidavit of debt filed with the filacer of each county. *Dunne v. Harding*, 450.

4. A capias issued against the defendant upon an affidavit sworn before and filed with the deputy filacer for Sussex. The defendant not being found in Sussex, the plaintiff caused an alias capias to be issued into Cornwall by the same officer, he being also deputy filacer for that county:—Held, that no new affidavit of the cause of action, or office copy of that already sworn, need be filed on issuing the alias. *Coppin v. Potter*, 272.

Payment of Money into Court.

5. Where money has been paid into court in lieu of bail, the plaintiff on moving to have it paid out to him is entitled to the costs of the application. *Freeman v. Paganini*, 165.

6. The court cannot allow part of a sum paid into court in lieu of special bail, to be appropriated to the purposes of a plea of tender—the 3rd section of the 7 & 8 Geo. 4, c. 71, expressly pointing out the only mode in which money so deposited can during the progress of the cause be released, viz. by putting in and perfecting special bail. *Stultz v. Heneage*, 472.

Adding Pleas.

7. In an action on a promissory note drawn in a foreign country, and due about twenty years since, the defendant pleaded the Statute of Limitations, and the plaintiff replied that he resided abroad until within six years of the commencement of the action. The court afterwards (upon terms) allowed the defendant to add a plea setting up a provision of the law of the country where the note was made and the parties resided, similar in its effect to the statute of limitations. *Huber v. Steiner*, 328.

Motion under the Interpleader Act.

8. The sheriff having seized goods under a fi. fa., notice was given to him on the 18th January that a fiat was about to be sued out against the defendant; and on the 28th a claim was made to the goods by the assignees:—Held, that an application by the sheriff on the 29th, for relief under the interpleader act, was sufficiently prompt. *Skipper v. Lane*, 283.

Inspection of Papers.

9. The plaintiff, assignee of A. who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff on the joint account of A. & B. The court allowed B. to inspect the books of A. in the hands of the plaintiff as his assignee, in order that he might discover what the alleged contracts were. *Whitbourne v. Pettifer*, 182.

Term's Notice of Proceedings.

10. The rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more than four terms, does not apply to proceedings taken on the part of the defendant. *Shinfield v. Laxton*, 187.

Setting aside and staying Proceedings.

11. The defendant was detained on a pluries capias having a blank for his place of residence, after a capias and alias describing him as of C. Street. The writ and proceedings were set aside, although it was sworn that the defendant had quitted C. Street, and had no known place of residence. *Roberts v. Wedderburne*, 488.

PRACTICE.*Setting aside and staying Proceedings—(Continued.)*

12. It is no ground for setting aside a declaration, that it has been delivered in defiance of an injunction of a court of equity restraining the plaintiff from proceeding at law. *Horne v. Took*, 183.

13. The plaintiff obtained a verdict at the Spring Assizes; the defendant died on the 18th April (the fourth day of Easter term); the costs were taxed on the 21st, final judgment signed on the 22nd, and a f. fa. issued on the same day, tested on the first day of the term.—The court refused to set aside the f. fa. for the irregularity in issuing it after the death of the defendant without a sci. fa.—the writ being warranted by the judgment, which the motion did not impeach. *Watson v. Maskell*, 461.

14. The plaintiff issued two writs, one out of this court, which was never served, the other out of the Exchequer, on which he proceeded to declare. The defendant pleaded to the action in the Exchequer, another action pending for the same cause in this court. The plaintiff replied nul tie record, and served the defendant with a rule to produce. The defendant made up a roll from the praecipe on the file of this court:—The court ordered it to be cancelled, with costs. *Kirby v. Siggers*, 481.

15. The plaintiff after being nonsuited, took out a fiat in bankruptcy against the defendant:—The court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 59th section of the 6 Geo. 4, c. 16. *Eicke v. Nokes*, 586.

16. The plaintiff obtained a Judge's order, with the usual undertaking, for the taxation of a bill of costs due from her son to the defendant:—Held, that it was not competent to her afterwards to bring an action against the defendant to recover back the money paid by her in pursuance of that order, in the absence of proof of fraud or misrepresentation by the defendant. The court, therefore, stayed the proceedings. *Kendall v. Allen*, 319.

17. A declaration for a penalty (consisting of one count only) concluded “to the *damage* of the plaintiff of 100*l.* The defendant demurred specially, assigning for causes this and another ground. The plaintiff entered a nolle prosequi as to the damages. A Judge at chambers ordered the nolle prosequi to be set aside:—The court supported the order. *Butler v. Mapp*, 258.

And see PATENT, 1.

Examination of Witnesses under 1 Will. 4, c. 22.

18. An application under the 1 Will. 4, c. 22, for the examination of a witness resident out of the jurisdiction of the court, must be made as early as possible after issue joined. *Brydges v. Fisher*, 458.

Writ of Trial.

19. The writ of trial under the 3 & 4 Will. 4, c. 42, s. 17, is to be directed to the Judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court. *Clark v. Marner*, 171.

20. A writ of trial was directed to the mayor of Colchester, and the cause was tried by his deputy. The court refused to set aside the proceedings, on a suggestion that the cause ought to have been tried by the mayor himself; it not appearing that that officer had no authority to appoint a deputy. *Ibid.*

Entry of Verdict.

21. In replevin, the defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankrupt

PRACTICE.*Entry of Verdict—(Continued.)*

had issued. A verdict having been taken for the defendant on the whole record—The court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Emery v. Mucklow*, 263.

Judgment.

22. The court rescinded a rule for judgment on a false plea of nul tie record to a scire facias, on the ground that four days had not been suffered to intervene between the delivery of the issue and the rule to produce the record. *Wood v. Frost*, 746.

Incidental proceedings.

23. The defendant being arrested applied to a judge to be discharged, on the ground of a supposed defect in the affidavit to hold to bail. The application being dismissed, the defendant requested the plaintiff's attorney to consent to receive certain persons as bail without opposition. The latter consented upon the understanding that the decision of the judge was acquiesced in:—Held, that the defendant had waived the objection to the affidavit, and could not afterwards apply to the court to enter an exoneretur on the bail-piece. *Mammatt v. Matthew*, 356.

24. A rule absolute may be drawn up during term on an order of a judge dated in vacation. *Swaine v. Stone*, 584.

And see REGULÆ GENERALES.

PROMISSORY NOTES—*See BILLS OF EXCHANGE AND PROMISSORY NOTES.*

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RELEASE.

The defendant and one M. N. gave the plaintiff their joint and several promissory note to secure a separate debt due from each of them. The plaintiff afterwards executed a deed of release to M. N.:—Held, that, although this release discharged both as to the note, it did not enure to the discharge of the separate debt of the defendant, but that the plaintiff might recover that upon an account stated. *Cocks v. Nash*, 162.

RENT—*See EXECUTORS AND ADMINISTRATORS*, 2.**REPAIRS**—*See EXECUTORS AND ADMINISTRATORS*, 3.**REPLEVIN.**

In replevin, the defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankrupt had issued. A verdict having been taken for the defendant on the whole record—The court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Emery v. Mucklow*, 263.

Semble, that, pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankrupt against the tenant founded on his demand for rent. ib.

REPLICATION—*See PLEADING*, 8.**ROADS**—*See TOLLS*.

RULES OF COURT—See REGLES GENERALES.**SCIRE FACIAS—See PATENT, 1.****SHERIFF.***Duties and Liabilities of.*

1. The 5th rule of Trinity Term, 1 Will. 4, which prohibits the changing of bail without leave of the court or a judge, applies to the case of bail put in by the sheriff for the purpose of rendering the defendant. *Rex v. The Sheriff of Essex*, 247.

2. The Sheriff having seized goods under a *fi. fa.*, notice was given to him on the 18th January that a fiat was about to be sued out against the defendant; and on the 28th a claim was made to the goods by the assignees:—Held, that an application by the sheriff on the 29th, for relief under the interpleader act, was sufficiently prompt. *Skipper v. Lane*, 283.

3. A sheriff who seizes the effects of a trader under a *fi. fa.* issued after a secret act of bankruptcy, of which he had no knowledge, and sells them, is liable for the value of the goods so seized and sold, in an action of trover at the suit of the assignees appointed under a commission subsequently issued against such trader. *Garland v. Carlisle*, 24.

4. Where the sheriff sells under an execution more than sufficient to satisfy the debt and costs, he is liable in trover for the excess. *Batchelor v. Vyse*, 552.

And see CASE.

SHERIFF'S COURT.

Practice as to motions for new trials where the cause is tried in the sheriff's court, or other inferior courts of record, in pursuance of the 3 & 4 Will. 4, c. 42, ss. 17, 18. p. 184.

SHIP OWNERS.*Liabilities to each other.*

The plaintiff and defendant were joint owners of a ship. At the end of a voyage, an account was made out of the receipts and disbursements, and the balance ascertained and paid. One of the items for which credit was given to the defendant in the account, consisted of a sum due from the partners to their broker, which sum the defendant undertook to pay. The defendant neglecting to discharge this debt, the plaintiff was arrested and compelled to pay it:—Held, that he might recover the amount from the defendant as money paid to his use. *Wilson v. Cutting*, 268.

SHIPPING.*Construction of Charterparty.*

1. The defendants hired a ship for a voyage to the East Indies and back; the freight for the homeward cargo to be 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. per ton; the fore cabin to be filled with light goods, and one hundred tons of rice or sugar to be shipped previous to any other part of the loading, *to ballast the vessel and keep her in proper trim for the voyage*. The defendants in pursuance of the charterparty shipped one hundred tons of rice, and completed the cargo with light goods, in consequence of which the master was compelled to ship a large quantity of stone ballast to enable the vessel to sail safely:—Held, that the defendants were at liberty, after shipping the hundred tons of rice, to complete the cargo with such goods as they thought fit, and were not bound to pay freight for the tonnage occupied by the additional ballast. *Irving v. Clegg*, 572.

Commencement of Voyage.

2. By a charterparty dated the 20th October, 1832, it was agreed that the ship should proceed in ballast to St. Michael's, there take in a cargo

SHIPPING.*Commencement of Voyage—(Continued).*

of oranges, and sail therewith direct to London, that, for the purpose of loading and unloading the vessel, the freighters should be allowed thirty-five running days to commence on the 1st December, provided the vessel had then arrived at St. Michael's, to continue till she was dispatched thence, to recommence on her arrival in London, and to cease on the discharge of the cargo, that the freighters should also be allowed to keep the vessel ten days longer on demurrage; and that, in case the vessel should not be arrived at St. Michael's on or before the 31st January, it should be optional with the agents of the freighters whether they should load her or not on the 7th November; the master sailed on an intermediate voyage to Oporto, and returned to Portsmouth, and on the 6th December sailed thence for St. Michael's, where he arrived on the 1st January, took in a cargo, and returned to London by the 1st February. In an action by the charterers against the owner for this deviation:—Held, that the sailing on the intermediate voyage, and thereby delaying the commencement of the voyage mentioned in the charterparty, whereby the cargo arrived at a period when the market was depressed, and consequently was sold at a loss, was a breach of the defendant's implied duty to commence the voyage within a reasonable time. *M'Andrew v. Adames*, 517.

And see TRESPASS, 2.

SLANDER.

1. The words "He is a thief. You have robbed one of my bricks":—Held, actionable, without any introductory averment or innuendo to explain them, or any averment of special damage. *Slowman v. Dutton*, 174.
2. The words "You have committed an act for which I can transport you":—Held, actionable, without colloquium or innuendo. *Curtis v. Curtis*, 337.

SPECIAL DAMAGE.

In an action by the charterers against the owner of a vessel for a deviation, the plaintiffs having sold the cargo to third persons, who in consequence of the late arrival of the ship sustained a loss, for which they called upon the plaintiffs to reimburse them:—Held, that the plaintiffs could not recover the money paid to these persons, by way of special damage—it not appearing that they were in a situation to compel the plaintiffs to make such payments, and the contracts with them appearing to have been entered into after the plaintiffs were aware of the breach of the charterparty. *M'Andrew v. Adames*, 517.

STATUTE OF FRAUDS.*Agreement to answer for the Debt of Another.*

1. One W. S. J., on behalf of himself and the other owners of the ship Warrior, chartered her to one H. C. S., for a voyage to Sidney and New South Wales, for a period of six months certain, or longer if required, at a certain monthly freight. Disputes having arisen between the parties as to the time from which the freight should begin to be payable, and as to whether or not security should be given for the six months' freight, and the plaintiffs having refused to permit H. C. S. to sail in the Warrior until the security was given; the defendant undertook to get a copy of the following guarantie (addressed to one of the defendants) signed by one T. P. M.:—"In consideration of your having on behalf of yourself and other owners of the Warrior entered into a charterparty with H. C. S., &c. &c.; and whereas the said H. C. S. hath paid or secured to be paid the said freight for the period of six months commencing from the 30th August last; and the said H. C. S. being about to leave England in the said ship;

STATUTE OF FRAUDS.

Agreement to answer for the Debt of Another—(Continued.)

I do hereby guarantee unto you, on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use and hire of the said ship which shall or may become due and payable from the said H. C. S. for any period beyond the said six months pursuant to such charterparty; and, in default of payment thereof as aforesaid by the said H. C. S. or his agent, I hereby undertake and agree to pay the same on demand:—Held—first, that this was not a contract to answer for the debt, default, or miscarriage of another, within the statute of frauds—secondly, that the undertaking itself would not have been binding upon T. P. M. himself, there being no consideration for the promise appearing upon the face of it, either directly expressed or to be supplied by fair and necessary inference; and consequently that nominal damages only could be recovered against the defendant for the breach of his undertaking to procure the signature of T. P. M. thereto. *Bushell v. Beavan*, 622.

Contract for the Sale of Goods.

A memorandum of a contract for the sale and purchase of goods, to satisfy the statute of frauds, is good though no mention be made of price, provided none be stipulated for; and, where the contract is for the sale of goods to be manufactured, and alterations or additions are made in the progress of the work, such alterations or additions need not be made the subject of a distinct contract in writing. *Hoadly v. Maclaine*, 340.

3. One A. having chartered a ship called the Active, to proceed to Gijon, in Spain, for a cargo of nuts to be shipped by the plaintiff, whose agent A. was, it was agreed between the defendants and A. that the Active should be loaded on account of the defendants, who directed A. to procure for them a cargo of nuts from the plaintiff. A. accordingly wrote to the plaintiff a letter, in which, after speaking of that vessel being chartered for the purpose of bringing home nuts, he said:—“We have transferred the Active to Messrs L. & S. (the defendants), for whom you will please to load her, in place of consigning her to us.” On their arrival the defendants refused to accept the nuts. In an action for such non-acceptance:—Held, that the above was a sufficient note or memorandum of the contract to take the case out of the statute of frauds, in so far as it sufficiently disclosed the subject matter of the contract, and was a memorandum signed by an agent of the parties properly authorized. *Acebal v. Levy*, 217.

Contract for an Interest in or concerning Lands, &c.

4. An agreement that the profits of a living should be applied in liquidation of the debts of the incumbent, signed by the creditors only, and not by the debtor, or by any person thereunto by him lawfully authorized, does not amount to such a substitution of a new agreement in the place of the old contract as to operate as a bar to an action at the suit of a creditor who has signed it—it being a contract “for an interest in or concerning lands, tenements, or hereditaments,” within the statute of frauds. *Alchin v. Hopkins*, 615.

STATUTE OF LIMITATIONS.

Construction of.

1. Assumpait for the balance of a bill of exchange. Plea, the statute of limitations. In order to take the case out of the statute, a letter was given in evidence, written by the defendant to the plaintiff, in which the defendant said:—“I cannot send you the 20*l.* I have no money by me now, nor shall I have till after our fair. Your better way will be to give up that bill which you hold, and draw another for 30*l. 9s. 9d.*, which will be the balance of the account, which shall be honoured when due:”

STATUTE OF LIMITATIONS.

Construction of—(Continued.)

—Held, that this was a sufficient acknowledgment to take the case out of the statute; the jury having found that the balance spoken of in the letter related to the bill in question. *Dabbs v. Humphrey*, 285.

2. In an action on a promissory note drawn in a foreign country, and due about twenty years since, the defendant pleaded the statute of limitations, and the plaintiff replied that he resided abroad until within six years of the commencement of the action. The Court afterwards (upon terms) allowed the defendant to add a plea setting up a provision of the law of the country where the note was made and the parties resided, similar in its effect to the statute of limitations. *Huber v. Steiner*, 328.

3. Payment of interest upon a promissory note by the makers to the personal representative of the payee within six years before the commencement of the action:—Held, a sufficient acknowledgment to take the case out of the statute of limitations, although the letters of administration under which the party claimed to whom the payments were made were not obtained in the diocese in which the note was bonum notabile. *Clarke v. Hooper*, 353.

STATUTES.

Decisions o

Attorney	<i>{ Admission, certificate, and enrolment</i>	<i>{ 2 Geo. 2, c. 23, s. 5. . . 12 Geo. 2, c. 13, s. 3. . . 22 Geo. 2, c. 46, s. 2. . . 30 Geo. 3, c. 19, s. 75. . . 34 Geo. 3, c. 14, ss. 4, 5. 37 Geo. 3, c. 90, s. 31. . .</i>	494 500
Bail	<i>{ Money paid into court in lieu of</i>	<i>{ 7 & 8 Geo. 4, c. 71, s. 3. . .</i>	472
Bankrupt	<i>{ Staying proceedings in action commenced be- fore the issuing the statute</i>	<i>{ 6 Geo. 4, c. 16, s. 59. . .</i>	586
Brewer	<i>{ Construction of statute Where one of several defendants in case suf- fers judgment by de- fault, and others have a verdict</i>	<i>{ 4 Geo. 4, c. 52. 4 Jac. 1, c. 3</i>	672 474
Costs	<i>{ On nolle prosequi . . . Where defendant held to bail without reason- able or probable cause</i>	<i>{ 8 Eliz. c. 2, s. 2 43 Geo. 3, c. 46, s. 3.</i>	491 380
Ecclesiastical Law .	<i>Avoidance of benefice</i>	<i>{ 21 Hen. 8, c. 13. 28 Hen. 8, c. 11.</i>	230
Executors	<i>Charging benefice . . . Where liable for costs . . .</i>	<i>{ 13 Eliz. c. 20. 3 & 4 Will. 4, c. 42, s. 31. . .</i>	615 461
Frauds, statute of	<i>{ Undertaking to answer for the debt of ano- ther What a sufficient memo- randum of the bar- gain on the sale of goods What a sufficient deli- very and acceptance of goods</i>	<i>{ 29 Car. 2, c. 3, s. 4. 29 Car. 2, c. 3, s. 17. 29 Car. 2, c. 3, s. 17. 9 Geo. 4, c. 14, s. 7. 29 Car. 2, c. 3, s. 17.</i>	622 217 340 389
Gaoler	<i>Venue in action against</i>	<i>{ 4 Geo. 4, c. 60, s. 75.</i>	578
Landlord & Tenant	<i>{ Debt for use and occu- pation</i>	<i>{ 11 Geo. 2, c. 19, s. 14.</i>	556

STATUTES.

Decisions on—(Continued.)

Limitations, stat. of	What a sufficient ac- knowledgegment to take case out of	29 Car. 2, c. 3. 9 Geo. 4, c. 14, s. 1. . .	285 353
Magistrate	Notice of action against .	24 Geo. 2, c. 44, s. 1. . .	316
Marriage	Validity of	26 Geo. 2, c. 33.	514
Pawnbrokers	Act for regulation of .	39 & 40 Geo. 3, c. 99. . . .	1
Poor-rate	{ Warrant of distress for, under}	50 Geo. 3, c. xlv, s. 3. . .	321
Post-horse Duty	Construction of statute .	4 Geo. 4, c. 62.	664
Post-office	{ Servants of, exempt from serving on juries . . .}	6 Geo. 4, c. 50.	160
Practice	Form of writ of capias .	2 Will. 4, c. 39, ss. 1, 4. .	488
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Private Act	Proof of	54 Geo. 3, c. xi.	177
Tithes	Alteration of indowment	13 Eliz. c. 20.	735
		{ 13 Geo. 3, c. 84. 39 Geo. 3, c. xlii. . . . }	683
Tolls	Construction of statutes	{ 58 Geo. 3, c. lxxii. . . . 1 & 2 Geo. 4, c. lxxxv. . . }	595
		{ 3 Geo. 4, c. 126, s. 7. . . 4 Geo. 4, c. 95, ss. 5, 6. }	683

STAYING PROCEEDINGS—*See Practice*, 11—17.SUMMONS—*See Poor-rate*.TAXATION—*See Costs*, 1.

TITHE.

1. Long and constant perception by the vicar of tithes not mentioned in the indowment, or the non-perception of any species of tithes which are mentioned therein, with evidence of their perception by the rector, will afford a sufficient ground for presumption by a jury that such augmentation or alteration of the indowment has been made by some antient and lawful or voluntary agreement. *Gilbert v. Towns*, 7. 5.

2. By an indowment of 1374, the vicar of Kingston was indowed of all small tithes arising within the vicarage, except what was specially reserved to the prior and convent of Merton. In an action by the rector, on the statute 2 & 3 Edward 6, c. 13, against the defendant for not setting out the tithe of potatoes grown by him within the parish, it appeared that there was a custom within the parish that all roots and vegetables grown in open fields, when cultivated by the plough, should go to the rector, and, when cultivated by the spade, should go to the vicar: and there was also evidence of enjoyment of tithe of potatoes by the rector from a very early period:—Held, that the jury were warranted in finding the tithe of potatoes to be rectorial, notwithstanding the indowment of the vicar, and the fact that potatoes were not introduced into this country until after the restraining statute 13 Eliz. c. 20. *Ibid.*

TITLE.

Investigation of—See Vendor and Purchaser.

TOLLS.

1. By a turnpike act a toll was imposed “for every horse, &c. drawing any coach, &c.,” with a proviso that no person should be subjected to pay toll more than once in any one day “for or in respect of any carriage or any horse, &c.” passing through the gates of the trust, such person producing a ticket denoting that the toll had been paid on that day. The plaintiffs passed with a stage-coach drawn by four horses, and paid toll:—Held, that they were

TOLLS—(*Continued.*)

not liable to a second toll for passing again on the same day with the same horses, though drawing a different carriage—the toll being imposed on the horses only. *Niblett v. Pottow*, 595.

2. By the general turnpike act, 13 Geo. 3, c. 84, the trustees of turnpike roads were empowered to demand and take for every waggon having the fellies of the wheels of less breadth or guage than six inches, and for the horses drawing the same, one half more than the tolls which should be payable for the same respectively. By s. 7 of the 3 Geo. 4, c. 126, which repealed the 13 Geo. 3, c. 84, the trustees under any local act were empowered from and after the 1st January, 1823, to take for any waggon having the fellies of the wheels of less breadth than $4\frac{1}{2}$ inches, or for the horses drawing the same, one half more than the tolls payable by such local act for any carriage having the wheels of the breadth of six inches. By the 4 Geo. 4, c. 95, s. 5, it is provided, “that, where the trustees of any road should not, previously to the passing of the 3 Geo. 4, c. 126, have taken and collected the additional tolls directed by the 13 Geo. 3, c. 84, and the local act should not have provided a scale of tolls applicable to the road, such trustees should from the 1st January, 1834, continue to take and receive for every waggon having the fellies of the wheels of less breadth than $4\frac{1}{2}$ inches, the same tolls as were by such local act payable in respect of such waggon:” and by s. 6, “that where any local act should have a prescribed rate of toll in respect of the breadth of the wheels of carriages, and where the additional toll authorised to be taken by the 13 Geo. 3, c. 84, should not have been collected and imposed, the trustees should, after the 1st January, 1824, continue to collect the tolls prescribed in the local act, and should not collect the increased toll under the 7th section of the 3 Geo. 4, c. 126;” By a local act, 1 & 2 Geo. 4, c. lxxxv, a scale of tolls was prescribed, by which a toll of $4\frac{1}{2}d.$ was imposed for each horse drawing any waggon drawn by four horses, whether the fellies of the wheels were of the breadth of six inches and upwards or less. The trustees under this act had, previously to the passing of the 3 Geo. 4, c. 126, taken and collected the additional toll directed to be taken by the 13 Geo. 3, c. 84:—Held, that such increased toll ($6\frac{1}{2}d.$) was properly demanded; the case not falling within the exemptions contained in the 5th and 6th sections of the 4 Geo. 4, c. 95. *Pickford v. Davis*, 683.

TRESPASS.*Declaration in.*

1. Declaration in trespass commencing “A. B. and C. D. complains,” &c., and stating that the defendant was summoned to answer the plaintiff—not demurrable. *Lyng v. Sutton*, 417.

Justification.

2. The defendants hired a steam vessel for the day to convey a party to Richmond and back to London. The vessel was navigated by the master, engineer, and crew of the owners, and at their expense:—Held, that the defendants had not such an exclusive possession of the vessel as to entitle them forcibly to expel the plaintiff, who had come on board with the permission of the master, for the purpose of being conveyed to Richmond. *Dean v. Hogg*, 188.

And see PLEADING, 3, 4, 5.

TROVER—*See SHERIFF*, 3, 4.**TURNPIKE**—*See TOLLS*.**USE AND OCCUPATION.**

Nil habuit in tenementis cannot be pleaded to a count for use and occupation, either in assumpait or debt. *Curtis v. Spitty*, 554.

VACANCY—*See ECCLESIASTICAL LAW*.

VARIANCE.*Between Declaration and Proof.*

1. A., having chartered a ship called the Active to proceed to Gijon, in Spain, for a cargo of nuts to be shipped by the plaintiff, whose agent A. was, it was agreed between the defendants and A. that the Active, should be loaded on account of the defendants, who directed A. to procure for them a cargo of nuts from the plaintiff. On their arrival the defendants refused to accept the nuts. In an action for such non-acceptance, the special count on the contract being framed upon an agreement to pay for the nuts "at the then shipping price at Gijon," and such being the contract proved by the parol evidence at the trial:—Held, a variance; inasmuch as the contract to be inferred by law from the written memorandum, was a contract to furnish a cargo, not at the price at the shipping port, but at a reasonable price—that is, such a price as the jury, upon the trial of the cause, should under the circumstances decide to be reasonable. *Acebal v. Levy*, 217.

2. In an action on the case on the statute 11 Geo. 2, c. 19, for an irregular distress, the declaration stated that the rent in respect of which the distress was made was due under a demise from A. and B.; the proof was of a demise by T.:—Held, a fatal variance, this allegation being of the foundation of the action. *Ireland v. Johnston*, 706.

VENDOR AND PURCHASER.

Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title—the injury accruing to the personal estate. *Orme v. Broughton*, 417.

VENUE.

By s. 75, of the statute 4 Geo. 4, c. 60, for the regulation of prisons, &c., all actions brought in respect of any thing done in pursuance of the act, are directed to be laid and tried in the county where the facts were committed. In an action on the case against the sheriff of Surrey and the keeper of the county prison for having without reasonable or probable cause confined the plaintiff, a debtor, in a felon's cell—the defendants not having acted in obedience to the 6th regulation in the 10th section of the act, which requires the keeper to obtain the sanction of the visiting magistrates for any deviation from the classification of prisoners thereby prescribed—Quære whether they were entitled to the benefit of the 75th section. But it appearing that the venue had originally been laid in London, that a rule nisi ('never made absolute') had been obtained by the defendants for changing it to Surrey, and that the plaintiff had made a rule absolute (unopposed) for bringing it back on special circumstances:—Held, that the objection that the cause was not tried in the proper county could not afterwards be urged. *Furnival v. Stringer*, 578.

2. Covenant against the personal representatives of the lessee of a term, sued as assignee, in respect of the privity of estate, is a local action. *Tremere v. Morrison*, 609.

3. But, where in such an action the venue was laid in Middlesex, and the declaration alleged that the defendant "entered into the premises and became possessed thereof, to wit, in the county aforesaid":—Held (on demurrer), that it sufficiently appeared that the premises were situate in the county in which the venue was laid. *Ibid.*

4. Semble, that, to let in the objection, it must appear on the face of the record that the venue is laid in the wrong county. *Ibid.*

And see PLEADING, 5.

VERDICT.

Entry of—See **PRACTICE**, 21.

WAIVER.

1. Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained. *Barham v. Lee*, 327.

2. The defendant being arrested, applied to a judge to be discharged, on the ground of a supposed defect in the affidavit to hold to bail. The application being dismissed, the defendant requested the plaintiff's attorney to consent to receive certain persons as bail without opposition. The latter consented upon the understanding that the decision of the judge was acquiesced in:—Held, that the defendant had waived the objection to the affidavit, and could not afterwards apply to the court to enter an exoneretur on the bail-piece. *Mammatt v. Matthew*, 356.

WARRANT OF ATTORNEY.

Entering up Judgment on.

1. Since the rule of Hilary 4 Will. 4, s. 1, reg. 3, it is not necessary in the affidavit on which the motion to enter up judgment on an old warrant of attorney is made to state that the defendant was alive on a day in term: it suffices if it appear that he was living at the time of signing judgment. *Cockman v. Hellyer*, 487.

Vacating.

2. Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the court will order it to be vacated as against the latter, and to stand as against the other parties. *Ashlin v. Langton*, 719.

WITNESS—See **EVIDENCE**.**WRIT OF ERROR.**

The plaintiff and defendant, by their respective attorneys, agreed that a question at issue between them should be raised on demurrer, in order to a more speedy adjustment of it; and it was further agreed, that, whatever the decision of the court on the argument of the demurrer might be, “each party should pay his own costs and charges in and about the cause, and that such decision should bind the parties.” Judgment having been given for the plaintiff on the demurrer:—Held, that it was not competent to the defendant to sue out a writ of error thereon. *Brown v. Lord Granville*, 333.

WRIT OF INTRUSION.

1. Practice as to the entry of a nolle prosequi by the defendant in a writ of intrusion. *Williams, dem., Harris, ten.*, 358.

2. The tenant in a writ of intrusion is not entitled to costs upon a nolle prosequi. The statute 8 Eliz. c. 2, is confined to personal actions. *Williams, dem., Harris, ten.*, 491.

WRIT OF TRIAL—See **PRACTICE**, 19.







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